21-430

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 228.

SIDNEY DILLON, APPELLANT,

vs.

GEORGE M. BARNARD, CHARLES S. BRADLEY AND CHARLES R. CHAPMAN, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 11, 1873.

Oct. 21874

SUPREME COURT OF THE UNITED STATES.

No. 228.

SIDNEY DILLON, APPELLANT,

vs.

GEORGE M. BARNARD, CHARLES S. BRADLEY AND CHARLES R. CHAPMAN, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Bill of complaint	3	1
Complainant's Exhibit A	11	6
Complainant's Exhibit B	15	8
Demurrer of assignees	31	17
Demurrer of trustees	32	18
Decree	34	19
Clerk's certificate	37	19
Bond to party	38	19

a. Circuit court of the United States, district of Massachusetts.

SIDNEY DILLON
v.
GEORGE M. BARNARD ET ALS. } In equity.

TRANSCRIPT OF RECORD.

1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three, before the honorable George F. Shepley, circuit judge, and the honorable John Lowell, district judge.

SIDNEY DILLON, COMPLAINANT,
v.
GEORGE M. BARNARD ET AL., DEFENDANTS. } In equity.

2 The bill of complaint in this cause was filed in the clerk's office on the seventeenth day of May, A. D. 1872, and was duly entered at the May term of this court, A. D. 1872, and is in the words and figures following, namely:

3 Circuit court of the United States, district of Massachusetts.

SIDNEY DILLON
vs.
GEORGE M. BARNARD ET ALS. } In equity. May, 1872.

To the judges of the circuit court of the United States for the district of Massachusetts:

Sidney Dillon, of the city, county, and State of New York, brings this his bill against George M. Barnard, of Boston, in the Commonwealth of Massachusetts; Charles S. Bradley, of Providence, in the State of Rhode Island, and Charles R. Chapman, of Hartford, in the State of Connecticut, as they are the assignees in bankruptcy of the Boston, Hartford and Erie Railroad Company, a corporation existing under the laws of the States of Massachusetts, Rhode Island, Connecticut, and New York, appointed and acting as such assignees under and by virtue of the proceedings in the matter of the bankruptcy of said corporation instituted and pending in the district court of the United States for the said district of Massachusetts, and against William T. Hart, of Boston, Massachusetts; George Talbot Olyphant, of Greenburg, West Chester County, New York, and Charles P. Clark, of Newton, Massachusetts, as they are trustees under a certain mortgage or indenture of trust hereinafter set forth.

And thereupon your orator complains and says:

1. The Boston, Hartford and Erie Railroad Company aforesaid
4 was and is a corporation duly existing under the laws of Massachusetts, Rhode Island, Connecticut, and New York, and under said laws was and still is authorized to construct, maintain, and operate the railroad hereinafter described in each of said States, except so far as the said right has been transferred or conveyed by virtue of the acts

and proceedings hereinafter described. From some day previous to the first day of March, A. D. 1866, until the transfer to the assignees in bankruptcy hereinafter mentioned, the said corporation owned the said franchises and the said railroad, or so much thereof as existed, subject to the liens hereinafter set forth.

2. On or about the twenty-first day of October, A. D. 1870, Seth Adams filed his petition in the district court of the United States for said district of Massachusetts, praying that said corporation might be adjudged bankrupt under and within the meaning of the act of Congress of the United States and amendments thereto commonly known as the bankrupt act, and that such proceedings might be had upon and in pursuance of his petition as were provided for by said laws. And upon said petition such proceedings were had that by a decree of the district court of the United States in and for this district of Massachusetts, sitting in bankruptcy, the said corporation was, on the second day of March, A. D. 1871, duly adjudged and decreed a bankrupt under the bankrupt laws of the United States, and on the eighteenth day of March, A. D. 1871, the defendants Bradley, Chapman, and Barnard were duly elected, approved, appointed, and qualified as assignees of the estate of said bankrupt under the laws of the United States, and on the same day, by a deed signed by S. Lothrop Thorndike, esquire, register in bankruptcy, duly acting in said cause, all the estate which said bankrupt corporation had on the twenty-first day of October, A. D. 1870, was duly conveyed to and vested in said assignees, subject, however, to all liens lawfully existing thereon; and the said assignees still are such duly qualified assignees.

3. The complainant says that at the present time, and on the said eighteenth day of March, 1871, and on the said twenty-first day of October, 1870, and long prior thereto, and at the times hereinafter mentioned, he had a valid and subsisting lien on the said property and franchises of said corporation arising from and created by the following facts and proceedings:

4. The said Boston, Hartford and Erie Railroad Company was a corporation duly existing under the laws of the States of Massachusetts, Rhode Island, Connecticut, and New York, and authorized to construct and maintain a railway, or railways, commencing at the foot of Summer street in Boston, in the State of Massachusetts, and running to Willimantic, in the State of Connecticut, through Thompson, in said State of Connecticut; and commencing at Providence, in the State of Rhode Island, and running to said Willimantic; and aiso, commencing on the northerly side of said city of Boston, and running through Woonsocket, in said Rhode Island, to Willimantic, and thence through the State of Connecticut, and a portion of the State of New York, to the western terminus of the location of the railway of the said company, on the east bank of the Hudson River at Fishkill; also, running from said Willimantic to the city of New Haven, in Connecticut; also, from a point in said Thompson to Southbridge, in the State of Massachusetts; and also, from and to divers other points and places, as by reference to the statutes of said States relating thereto, and to which the complainant craves leave to refer, will more fully appear.

5. For the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the railroad of said corporation, and for the purpose of completing and equipping their railroad, then only partly constructed, the said corporation, by a mortgage-deed or indenture of trust, dated the nineteenth day of March, A. D. 1866, a copy whereof is hereto annexed marked B, did on that day con-

vey and assign unto Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis all its railways, rights, privileges, and franchises, and all its property then owned or thereafter to be acquired, to be held by the said Berdell, Gregory, and Davis, and their successors, in trust, upon the terms and for the purposes in said indenture set forth and provided. The said trust-indenture was duly agreed to, executed, and delivered by the said corporation and the said trustees; and the same was
6 duly authorized and ratified by the laws of the States of Massachusetts, Rhode Island, Connecticut, and New York, to wit: by chapter 142 of the laws of Massachusetts of the year 1866, approved on the twelfth day of April, 1866; by a law of the State of Rhode Island, passed by the general assembly at the January session, in the year 1866; by a law of the State of Connecticut, approved on the eleventh day of May, in the year 1866; by a law of the State of New York, passed on the twenty-fourth day of April, in the year 1866, and by other previous laws in each of said States relating thereto.

6. Among other things it was provided by that indenture that certain bonds or evidences of debt, to an amount named in said indenture, should be issued, sold, and disposed of as the means and for the purpose of raising money so to complete and equip their said railroad; that said bonds, when certified or attested by the signatures of the said trustees or their successors, should be secured by said indenture and conveyance, and should, by virtue of said indenture, conveyance, and certification, be and become a lien upon the property therein described and thereby conveyed, or agreed to be conveyed, and particularly that they should be and become a lien upon, and in that manner should have the benefit of, all the property afterwards purchased and the increase in value of the said railroad afterwards given to it by means of the expenditure of the money so to be raised by the sale and disposal of said bonds secured as aforesaid. The said railroad was at that time of small value, because not completed, and was not of a value equal to the amount of bonds proposed to be issued under said indenture, and the said railroad corporation was destitute of means to complete the same; but the said corporation expected that, upon its completion, their road would be of large value, and would afford ample security for the said bonds. The better to attain those objects, to wit, the acquisition of more property which should pass by and be held under said conveyance, and the construction of the unbuilt portions of the railroad, also to be held under said conveyance, and the improvement and completion of portions of the railroad already existing and held under said conveyance, for the benefit of the said trustees and the holders of said bonds, and in order to induce other persons to enter into contracts
7 for the construction and completion of said railroad, it was further agreed by said indenture, and was a part of the terms and trusts under which the trustees held and were to hold the trust estate, and according to which they and the said corporation bound themselves and their successors to act, that the expenditure of all sums of money realized by or from the sale of the bonds issued under said mortgage should be made with the approval of at least one of the said trustees, whose assent in writing should be necessary to all contracts made by the railroad corporation for the purposes aforesaid before the same should be a charge upon any of the sums received from said sales, and that such contracts, so assented to, should and would be a charge upon such sums so received and realized by or from such sales.

7. Afterwards, on or about the twenty-fourth day of October, A. D. 1867, it was agreed between the complainant and said corporation and

said trustees, that the complainant should construct a certain portion of the said railroad, and on or about that day the complainant and the said railroad company made and executed the agreement in writing, a copy whereof is annexed, marked A, which contract was approved and assented to by the trustees, as provided in said indenture, by their written approval and assent written thereon in the following words: "The above contract approved and assented to by us as trustees under the mortgage of the B. H. & E. R. R., dated March 19, 1866," which approval and assent was signed by the said Gregory and the said Davis, then being trustees as aforesaid, and afterwards the said contract with said approval was delivered to the complainant.

8. The purpose, object, intention, and understanding of the parties, to wit, the said corporation, the trustees, and the complainant, in procuring such approval in making the same, and in accepting the said contract so approved, was that the sums to become due to the complainant under that contract should be a charge upon the sums to be received from said sales of said bonds, no part of which, or a very inconsiderable part of which, had then been sold or disposed of. The complainant thereafter undertook and performed work under said contract, and expended very large sums of money thereunder, relying for his compensation on the sums of money to be derived from said
8 sales of bonds, and his lien thereon by virtue of the premises as aforesaid; and his said reliance thereon was at all times well known to said corporation and to the trustees under said mortgage indenture.

9. The complainant performed a great deal of work and spent a large sum of money in the performance of his said undertaking, and large amounts became due to him from time to time under said contract. All his work under said contract was duly accepted by the engineer in charge, as therein provided, and by the said railroad corporation and the said trustees; and from time to time payments were made to him therefor, but he was not wholly paid; and there now remains due to him the sum of one million thirty thousand six hundred and ninety-three $\frac{29}{100}$ dollars, with interest from the first day of January, A. D. 1870.

10. Under and by virtue of the premises, the amounts due to the complainants under said contract, and the said amount of one million thirty thousand six hundred and ninety-three $\frac{29}{100}$ dollars and interest, now due to him as aforesaid, became and were a charge and lien upon the money which should be and which was derived and raised from the sale and disposal of said bonds. A large sum of money was raised by means of said sales, which, or so much thereof as was needed for the purpose, was justly and legally applicable to the said claims of the complainant, and thereby became appropriated to and ought to have been used and paid to discharge the said debt to the complainant, and to no other purpose, and the amount actually received from such sales and justly applicable to the payment of said debt to the complainant was amply sufficient to pay the same. It was within the power of the trustees under said indenture, as well as of said corporation, to cause the same to be devoted to that purpose, and to prevent the same from being devoted to any other purpose. By virtue of the premises, the said trustees and the said corporation became bound to the complainant so to do, and became trustees for his benefit for that purpose under said indenture and agreement. But, not regarding the complainant's just rights, neither the said named trustees, nor their successors in said trust, nor the said corporation, did cause the said money so justly
9 applicable as aforesaid to be paid to the complainant as they

ought to have done; and the said trustees and said corporation did wrongfully permit and suffer the money which ought to have been paid to the complainant as aforesaid to be expended for other purposes, and in particular they permitted and caused the same to be expended n acquiring new property to be held under said indenture, and in improving and increasing the value of property already and since always held by said trustees under said indenture. The money so wrongfully expended, and suffered and permitted to be expended, greatly exceeded the amount now due and which ought to be paid to the complainant; and the value of the new property so improperly acquired by such expenditure and the increase of value so added to the property held under said indenture greatly exceeded the amount due to the complainant.

11. After the making of said mortgage, such proceedings were had that, on or before the filing of this bill, to wit, on or about the twenty-eighth day of July, A. D. 1871, the defendants, Hart, Olyphant, and Clark, became and were the trustees under said mortgage as the successors of said Berdell, Gregory and Davis, and the property and estate held thereunder became vested in them, and the duties and obligations incumbent upon the trustees thereunder became incumbent and binding on them accordingly; and afterwards, and before the filing of this bill, to wit, on the 17th day of August, 1871, the said Hart, Olyphant, and Clark, as such trustees, entered upon and took possession of, and as such trustees now hold under said indenture of trust or mortgage, all the property covered by it, and, among other property, they also in fact hold and claim thereunder the property so acquired and so increased in value by means of the expenditure of money which ought to have been devoted to paying this complainant's claim as aforesaid. And thereafter, to wit, on or about the sixth day of September, A. D. 1871, they filed in the respective offices of the secretaries of state of the States of Massachusetts, Rhode Island, Connecticut, and New York a written notice that they had taken possession of said property for the purpose of foreclosing the said mortgage as provided in said mortgage; and they now hold and claim to hold the same for that purpose.

10 12. Before the filing of this bill the said corporation became and was insolvent, and at the time the complainant's said debt became due, it was insolvent and had no funds or property from which the complainant's claim could be satisfied, except such as was then claimed under said mortgage, and is now held under the same by the trustees thereof as aforesaid.

13. Wherefore, and to the end that the claims and liens upon said property now in the possession of said trustees may be ascertained, adjusted, and liquidated, and that the said lien and claim of the complainant may be declared valid and subsisting, and that it may be enforced for the purpose of satisfying his said claim, the complainant brings this his bill in equity.

14. The complainant prays that the said Barnard, Bradley, and Chapman, assignees as aforesaid, and that the said Hart, Olyphant, and Clark, and their successors, may be declared trustees for the benefit of the complainant of the said property held by said trustees as aforesaid, under said indenture, to the extent of the amount of money and interest thereon which was due to the complainant and so as aforesaid wrongfully expended in acquiring and improving and adding value to said property; and trustees for the benefit of the complainant of so much of said property, and of the value in the hands of said trustees, as was acquired by and as is due to such wrongful expenditure; and may be decreed to account to the complainant for the amount of money so wrongfully

expended as aforesaid, and for the value of the property so held by the said trustees and acquired by means of such expenditure, and for the increased value, which, by means of such wrongful expenditure, was given to the property so held; and that they may be ordered to apply to the payment of the debt due to the complainant, as aforesaid, the money and the value for which they are his trustees, as aforesaid, and for which they ought to account to him, as aforesaid, and that they may be ordered to pay to the complainant the amount of his said debt and interest; and that all persons (if there be any such) who have, or pretend to have, any claim upon or to the said fund and property realized from and acquired by the said sales of bonds and so as aforesaid
11 wrongfully applied, may be required to come in and be made parties hereto when discovered, to the end that all such claims may be ascertained, adjusted, and liquidated so far as they may conflict with the complainant's claim and right of priority touching the premises; and that the complainant may have such other and further relief as the nature of his case may require.

15. May it please your honors to grant unto your orator your writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said George M. Barnard, the said Charles S. Bradley, and the said George R. Chapman, and to the said William T. Hart, the said George Talbot Olyphant, and the said Charles P. Clark, commanding them and each of them, under a certain penalty, to be therein named, at a day therein to be named, to be and appear before this honorable court, to answer the premises and each part thereof as fully as though each part were again set forth, and each defendant thereupon particularly interrogated, and to stand to, abide, and perform such orders and decrees as this honorable court shall make in the premises.

SIDNEY DILLON,
By JAMES J. STORROW,
His Attorney.

J. J. STORROW, *Solicitor.*

S. BARTLETT,
J. J. STORROW,
Of Counsel.

EXHIBIT A.

This agreement, made and entered into the twenty-fourth day of October, A. D. one thousand eight hundred and sixty-seven, by and between Sidney Dillon, party of the first part, and the Boston, Hartford and Erie Railroad Company, party of the second part, witnesseth:

That for and in consideration of the payments and the covenants hereinafter contained, to be made and performed by the party of the second part, the party of the first part hereby agrees, and binds himself and
12 assigns, to construct and finish in the most substantial and workmanlike manner all the graduation, masonry, superstructure of bridges, and all other such work as may be required to complete for a single track in readiness for the track superstructure, and the laying of the track thereon, of that portion of the line of the Boston, Hartford and Erie Railroad lying between Waterbury, in the State of Connecticut, and Fishkill Landing, upon the Hudson River, in the State of New York; the whole to be done agreeably and in conformity to the plans, specifications, and surveys to be hereafter furnished from time to time by the engineer of the party of the second part, and subject to his ap-

proval and acceptance; the work to be commenced by the first day of December next ensuing, and to be completed by the first day of June, A. D. one thousand eight hundred and sixty-nine.

And in consideration of the true and faithful performance by the party of the first part of his part of this contract, the party of the second part hereby agrees and binds itself to well and truly pay to the said party of the first part, or his assigns, according to the measurement and returns of the said engineer of the party of the second part, as follows, to wit:

For each and every cubic yard of earth-excavation required under this contract, the sum of fifty cents.

For each and every cubic yard of loose-rock excavation required under this contract, the sum of one dollar.

For each and every cubic yard of solid-rock excavation required under this contract, the sum of two dollars and twenty-five cents.

For each and every cubic yard of first-class bridge-masonry, the same being cut-work, constructed under this contract, the sum of sixteen dollars and twenty-five cents.

For each and every cubic yard of second-class bridge-masonry, the same being rubble-work, constructed under this contract, the sum of twelve dollars.

For each and every cubic yard of said first-class arch-masonry, the same being cut-work, constructed under this contract, the sum of twenty dollars.

For each and every cubic yard of second-class arch-masonry, the same being rubble-work, constructed under this contract, the sum of sixteen dollars and twenty-five cents.

For each and every cubic yard of masonry for covered culverts
13 and cattle-guards, constructed under this contract, the sum of seven dollars.

For each and every cubic yard of masonry for bank and slope walls, constructed under this contract, the sum of five dollars.

For each and every running foot of bridging for cattle-passes and private ways, required under this contract, the sum of ten dollars.

For each and every running foot of bridging for road-crossings and other purposes, not exceeding 30-foot span, required under this contract, the sum of twenty-two dollars and fifty-two cents.

For each and every running foot of bridging, of a span exceeding 30 feet, required under this contract, the sum of forty-five dollars.

For grubbing and clearing done under this contract, at the rate of one thousand dollars per mile.

For every cubic yard of material excavated and hauled beyond a distance of five hundred feet, an additional sum of one cent per each 100 feet in distance in excess of said hauls.

For the actual extra cost of hauling stone for any of the masonry required under this contract a greater distance than one mile, an amount to be fixed by the engineer of the party of the second part.

For each and every mile of track laid under this contract, the sum of seven hundred dollars.

For each and every cubic yard of ballasting required under this contract, the sum of fifty cents, the party of the second part to furnish the necessary cars and motive-power to do the same.

Payments to be made monthly of 90 per cent. of the amount of work done, as estimated and returned by the said engineer of the party of the second part; the remaining 10 per cent. to be retained by the party of the second part, to be paid by them to the party of the first part upon the final completion and termination of this contract.

In witness whereof the said party of the first part has hereunto set his hand and seal, and the party of the second part has caused the signatures of its president and its corporate seal to be affixed hereto this day and year first above written.

(Signed) SIDNEY DILLON. [SEAL.]

BOSTON, HARTFORD AND ERIE RAILROAD CO.,

[SEAL.] By JOHN S. ELDRIDGE,

President.

14 The above contract approved and assented to by us as trustees under the mortgage of the Boston, Hartford and Erie Railroad Company, dated March 19th, 1866.

(Signed) D. S. GREGORY. [SEAL.]

J. C. B. DAVIS. [SEAL.]

Signed, sealed, and delivered in the presence of—

HENRY THOMPSON.

MORTIMER SMITH.

It is hereby further agreed by and between the parties to the above contract that the said party of the first part shall at all times keep a just and true account of all the work and labor done thereunder, and of all the materials provided thereunder; to which accounts the said Boston, Hartford and Erie Railroad Company shall, at all reasonable times, have access through their officers and agents designated for that purpose. And it is further agreed (without in any manner changing the mode and time of payments under the contract) that the said Boston, Hartford and Erie Railroad Company may, at any time before the first day of January, A. D. 1869, elect whether they will pay the said party of the first part for such work, labor, and materials the several sums fixed and named, and to be determined as in the above contract provided, or whether they will pay the said party of the first part therefor the actual cost of the same, as shown by such just and true accounts, and ten per cent. thereof additional thereto as a profit and remuneration to the said party of the first part. And in case they shall elect to pay the said party of the first part as herein last named, in lieu of making payments as provided in said contract, then the payments shall thereafter as to the amounts to be paid be made in accordance with such election, but in every other respect as provided in said contract.

Dated at New York, the tenth day of February, A. D. 1868.

(Signed) SIDNEY DILLON.

15 EXHIBIT B.

This indenture of mortgage, made this nineteenth day of March, in the year one thousand eight hundred and sixty-six, by and between the Boston, Hartford and Erie Railroad Company, a corporation existing under the laws of the States of New York, Connecticut, Rhode Island, and Massachusetts, party of the first part, and Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees, parties of the second part, witnesseth:

Whereas the shareholders of the Boston, Hartford and Erie Railroad Company, at a meeting duly and lawfully called and held at the city of New York, on the fourteenth day of March, A. D. 1866, voted to authorize the directors to make application to the several legislatures of the States in which the chartered rights of this road exist, for

authority to make a mortgage upon the whole or any portion of the line of the road, and to create, issue, and dispose of, at the best rates that can be obtained, their convertible mortgage-bonds, payable in the city of New York, on the 1st day of July, A. D. 1900, for one thousand dollars each, not to exceed the amount of twenty millions of dollars in all, (such portion of the principal and interest thereof, however, as the directors of the company may authorize, to be made payable in London, in the kingdom of Great Britain, in sterling currency, at the rate of four shillings sterling to the dollar,) interest payable semi-annually on the first days of January and July in each year, at the rate of seven per cent. per annum, interest and principal to be payable at such places in the city of New York or in London as the directors may authorize; and the particular form of bonds, interest-warrants thereon, and mortgage, to be left entirely at the discretion of the board of directors, the said bonds to be issued for the purpose of providing for and retiring all the existing mortgage-debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing
16 and equipping their road, and of laying down a third rail so as to form an additional track corresponding with the gauge of the Erie Railway of New York.

And whereas the said board of directors, at a meeting duly convened and held in the city of New York, on the nineteenth day of March, 1866, voted to authorize the creation and issue of the first-mortgage bonds of said company in the following form, when of Federal currency, (to wit:)

No. ———.] [$1,000.

BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Know all men by these presents, that the Boston, Hartford and Erie Railroad Company acknowledges itself indebted unto Dudley S. Gregory, or bearer, in the sum of one thousand dollars, lawful money of the United States, which sum it promises to pay, at its office or agency in the city of New York, on the first day of January, in the year one thousand nine hundred, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of January and July in each year, on the presentation and delivery of the proper annexed interest-warrants.

This bond is one of a series of twenty thousand bonds, of even date herewith, issued for the purpose of paying the existing debt of the company, and of completing and equipping their road. The payment of the principal and interest hereof is secured by a mortgage of the railroad and franchises, furniture and equipment of this company, bearing date March 19, A. D. 1866, which has been made in trust to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, which is to be the first and only lien on the property and franchises of the company, when the existing mortgage-debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees.

Upon the failure to pay any one of the interest-warrants hereto attached, upon due presentation, on or after maturity and offer to surrender the same, provided said default continue for the space of
17 six months thereafter, this whole series of bonds, upon the election of the holders and owners of a majority thereof, signified in writing to the mortgagor and to the trustees, shall become due and payable.

This bond is convertible at the option of the holder, being then the owner thereof, into the common capital stock of this company, and upon the surrender of the same with the proper coupons annexed, the company agrees to issue a certificate or certificates of capital stock therefor at par, as at any time authorized by law, when this bond will be cancelled.

In witness whereof this company has caused its corporate seal to be hereto affixed, and this bond to be signed by its president and its secretary, the day of eighteen hundred and sixty-six.

[SEAL.]

President.

Secretary.

We certify that this bond is one of the twenty thousand bonds of one thousand dollars each, (or two hundred pounds each, when in sterling currency,) secured by the mortgage referred to above, and that said mortgage has been delivered to us and recorded as authorized by law.

Trustees.

And such of the said bonds as shall be made payable in sterling currency shall be for the principal sum of two hundred pounds sterling, in lieu of one thousand dollars, and the principal and interest thereof shall be made payable at such places in London as the directors of the company shall authorize, in lieu of the office or agency of the company in the city of New York.

And whereas the said directors, at their said meeting, further voted to empower bonds of said form, either in Federal currency or sterling currency, or either, hereafter to be issued, and to be secured under the mortgage, and the said corporation thereby to become indebted to the divers persons or bodies politic or corporate who may become the holders thereof, but not in a greater principal sum than twenty millions
18 of dollars in all, or a proportionate part thereof in sterling currency, at the rate of four shilling sterling to the dollar; and further, at the same time, voted to secure the entire issue of said bonds by the execution of a mortgage in the form of these presents:

Now, therefore, this indenture witnesseth, that the parties of the first part, for the better securing and more sure payment of the sums of money mentioned in the said mortgage-bonds, and each of them according to the tenor thereof, and in consideration of one dollar to them paid by the parties of the second part, at or before the ensealing hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, aliened, released, and confirmed, and by these presents do grant, bargain, sell, convey, alien, release, and confirm unto the said parties of the second part, and the survivor of them and to his and their successors and assigns, all and singular the railways of said Boston, Hartford and Erie Railroad Company, commencing at the foot of Summer street in Boston, in the State of Massachusetts, and running to Willimantic, in the State of Connecticut, through Thompson, in said Connecticut, and commencing at Providence, in the State of Rhode Island, and running to said Willimantic; and also commencing on the northerly side of said city of Boston, and running through Woonsocket, in said Rhode Island, to said Willimantic, and thence through the State of Connecticut and a portion of the State of New York to the western terminus of the location of the

railway of said company, on the east bank of the Hudson River at Fishkill; also running from said Willimantic to the city of New Haven, in Connecticut; also from a point in said railway in said Thompson to Southbridge, in the State of Massachusetts, as said railways are now or shall be located, constructed, or improved, under or by virtue of any powers now granted or that may hereafter be granted or obtained to locate, construct, or use a railroad on any of said indicated lines, with all the lands that are included or may be included in the location of said railway, or acquired for the uses of said company within the terminal points aforesaid, but not including the lands at the termini at Boston and at
19 Fishkill, which are outside of the location of said railroad, together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water-tanks, shops, buildings, piers and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases, and charters; also all the like estate, roads, railroads, and structures, and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed or belong to or be controlled by the party of the first part; together with all the tolls, income, issues, and profits to be had from the same, and all rights to receive and recover the same, and everything necessary for the complete use of the road; also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures, and machinery, and all the coal, wood, and other fuel belonging or appertaining to said railroad, or that may at any time hereafter belong or appertain to the same, as it may be changed by use and new acquisitions; also all the estate, real, personal, and mixed, of any of the foregoing descriptions, or of any other kind which may be hereafter acquired by the party of the first part, and used or intended to be used in the construction and operation of the said railroad.

To have and to hold the same, together with all and singular the emoluments, income, and advantages, tenements, hereditaments, and appurtenances thereunto belonging, unto the said parties of the second part and the survivor of them, and his and their successors and assigns forever, on the trusts and for the uses and purposes herein declared, and none other.

Provided always, and these presents are upon the express condition, that if the said parties of the first part shall well and truly pay, or cause to be paid, to the holders of the said mortgage-bonds or obligations intended to be secured hereby, and every of them, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with interest thereon at the times and in the manner therein provided, according to the true intent and meaning of these presents, that then and from thenceforth this indenture and the estate hereby granted shall cease, determine, and be utterly void.

20 And this indenture further witnesseth, that these presents and the said mortgage-bonds or obligations, hereby intended to be secured, are made, executed, and delivered upon the terms, conditions, and agreements following, that is to say:

First. That the actual possession, use, management, and control of all the granted premises shall remain with the parties of the first part so long as the said mortgage-bonds shall remain without default or forfeiture, who may, from time to time, with the consent of the trustees, in writing, sell or exchange any of the mortgaged estate, and purchase with the proceeds other property to be included under this indenture.

Second. That in the case of the death, resignation, or removal of one of said trustees, the premises hereby conveyed and the trusts hereby created shall vest in the survivors or survivor, who shall thereupon

appoint in writing, by deed, a person or persons in the place and stead of the trustee or trustees so deceased, resigned, or removed; and such appointment and the acceptance thereof shall vest the said premises and trusts in the person so appointed jointly with the trustees so appointing as fully as if such appointment had been originally made in this deed; and all subsequent vacancies happening in said trust shall be filled in like manner and with like effect by the trustee in each case remaining. And in case of the decease, removal, or resignation of all of said trustees, the vacancies may be filled by any judge of the supreme court of the State of Connecticut, on application of any party interested, on such notice to the other parties interested as the judge acting shall order; and the trustees so appointed and accepting shall become vested with all the franchises and estate hereby conveyed on recording or lodging a certified copy of the order for their appointment in all places where this mortgage is required by law to be recorded or lodged.

And this indenture further witnesseth, that the said parties of the first part, for themselves and their successors, do covenant and agree to and with the said parties of the second part, the survivor of them, and his and their succeseors and assigns—

1st. That they will at their own proper charge do all things necessary to be done to keep intact the lien hereby created.

21 2d. That they will at any time or times hereafter, upon the request of said parties of the second part, their successors or assigns, make, do, and execute, and cause to be made, done, and executed, all and every such further and reasonable acts, conveyances, assignments, and assurances in the law for the better and more effectual vesting and confirming the premises hereby granted, or intended so to be, in and to the said parties of the second part, their successors and assigns forever, as by the said parties of the second part, their successors or assigns, or their counsel learned in the law, shall be reasonably devised, advised, or required.

3d. That of the whole issue hereby authorized to be made of said bonds there shall be retained in the hands of said parties of the second part such amount of said bonds as shall be equal to the whole amount of the bonds and mortgage-notes outstanding from time to time which are a lien upon any of the property or franchises hereby conveyed, which are to be delivered to the parties of the first part only on the cancellation of a corresponding amount of said outstanding bonds or mortgage-notes.

4th. That the party of the first part will, at the close of the year 1869, and at the close of each year thereafter during the continuance of this trust, pay to the parties of the second part, their successors, and assigns, a sum equal to ten per cent. upon the net earnings for the current year, remaining after the payment of the current interest for that year on the then outstanding bonds issued under this mortgage; which sums the said trustees shall invest as received in said mortgage-bonds, if the same can be purchased at not exceeding one hundred and twenty-five per cent.; and if they cannot invest the same in said mortgage-bonds at that limit, they shall invest them in gold-bearing securities of the United States; and they shall invest all sums received from interest and dividends on the trust-fund in like manner, and shall hold the trust-fund as a security for the payment of the said mortgage-bonds at maturity, and shall annually, on the first day of January in each year, report the condition of the said trust-fund to the secretaries of state of the States of Massachusetts, Rhode Island, Connecticut, and New York.

22 5th. That the parties of the first part will pay unto the holders of the said mortgage-bonds respectively the said principal sums of money respectively mentioned as above, and as expressed in said bonds, and will pay the interest thereon as the same shall become due and payable.

6th. That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales.

7th. That in case default be made by said company in payment of any moneys, either principal or interest, secured hereby, (the default continuing for six months,) the said company shall, on demand of the trustees or trustee for the time being, or his or their agent authorized thereto in writing, deliver to said trustees or trustee, or his or their agent, the actual possession of all the herein-granted premises; and thereupon the said parties of the second part shall and may by themselves, their officers, agents, and employees, take, receive, and operate the said railroad franchises and other property and estate hereby conveyed, and collect, receive, and have the rents, income, and profits thereof as fully as the party of the first part could do if no default had been made; and, while so in possession, the said party of the second part shall apply such part of said rents, income, and profits as shall in their judgment be necessary to the payment of the running and operating expenses of the road, including the necessary repairs of road, roadbed, buildings, machinery, and equipment, and all expense of agents, clerks, officers, employees, and laborers, and all claims for damages allowed, and all payments for insurance and taxes, and all items usually distributed to transportation expenses in railroad accounts, and to such increase and improvement of said roads, buildings, machinery, and equipment as the business shall in their judgment require, and to the payment of any and all claims necessary to secure and assure to
23 them the estate and franchises hereby conveyed, and to their own compensation, and to the employment of competent legal advisers in their discretion, and to any and all other charges that are or should be allowed by a court of equity in the case of a receiver, as settled and established in the case of the receivership of the New York and Erie Railroad. And the parties of the second part are further authorized and empowered, after having taken possession as aforesaid, to contract with any other corporation to lease or to operate the said railroad and franchises for any period not exceeding the term that the trustees are herein authorized to retain possession thereof.

8th. Said parties of the second part having taken possession as aforesaid, shall be further authorized, and may be required, whenever there shall be in their possession a sufficient sum for such purpose, (not required for any of the purposes aforesaid,) to pay in full any one class (beginning with the earliest) of matured and over-due interest-warrants on said bonds to the person or persons holding and presenting them for payment; and the said parties of the second part shall, while in possession of said roads and operating the same, or causing the same to be operated on a lease thereof, keep full and accurate accounts of all sums received or paid out by them, which shall be at all reasonable times open to the inspection of the party of the first part, and they shall at least once a year publish abstracts thereof for the use of the bondholders; and whenever the said parties of the second part are in doubt as to any of their

powers or duties in the premises, they may apply to the supreme court of the State of Connecticut, or any judge thereof in chambers for directions, and the directions or order of said court, or of such judge thereof on their application, when complied with, shall be their full protection for so doing.

9th. On taking possession as aforesaid the said trustees shall file in the offices of the secretaries of state of the States of Massachusetts, Rhode Island, Connecticut, and New York a written notice, acknowledged before a notary public, that they have taken possession of said mortgaged property, franchises, and estate for default in the payment of principal or interest, or both, as the same may be, and of their pur-
24 pose to foreclose the said mortgage for said default. And if the said default shall continue for the space of eighteen months after such notice shall be filed, the whole of the mortgaged premises and franchises shall vest absolutely and in fee in the parties of the second part, without further assurance and without further process of law, and all right or equity of redemption of the party of the first part therein shall be forever barred and foreclosed; but if the whole of the principal and interest in arrear, with interest thereon when the same may by law be demanded, and the lawful claims, disbursements, and liabilities of the said trustees made or incurred as aforesaid on account of their trust, shall be paid and satisfied within the said period of eighteen months after the said notices shall have been filed, either by the said party of the first part (which right they are to have) or out of the net earnings of the property in the trustees' possession, then the said parties of the second part shall surrender unto the said parties of the first part the said mortgaged property, franchises, and estate, and all additions made by them thereto, and the said parties of the first part shall thereupon and thereby become revested with the same, as of their former estate, without further assurance.

10th. In case of an absolute foreclosure under the provisions of this instrument, it shall be the duty of the trustees to call a meeting of the holders of the mortgage-bonds secured by this instrument, by an advertisement of the time and place and object thereof at least three times a week, for three successive weeks, in newspapers published, one in the city of Boston, one in the city of Providence, one in the city of Hartford, one in the city of New York, and one in London in England; and the bondholders at such meeting may, at an election to be presided over by such of the parties of the second part or their successors as shall be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, choose from their number a board of directors of like number with the then board, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such
25 outstanding mortgage debt, divided into shares of one hundred dollars each, which said corporation shall be invested with all the powers, privileges, and franchises, and shall be subject to all the duties, liabilities, and restrictions of the Boston, Hartford and Erie Railroad Company, and shall consist of the holders of the mortgage-bonds secured hereby at the rate of ten shares for every bond of one thousand dollars or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid. And the said parties of the second part shall by deed convey unto the said new corporation all the said mortgaged property, premises, estate, and franchises, and all additions thereto, and all moneys remaining in their hands when they shall be fully paid and indemnified

for their services and liabilities as hereinbefore provided; copies of which said deed shall be recorded or lodged wherever this instrument is required by law to be recorded or lodged; and upon the organization of the bondholders into a corporation they shall file in the offices of the several secretaries of state above named copies of their proceedings in the organization under their corporate seals, attested by their president and secretary, which shall be prima-facie evidence in all suits for or against them that they are a corporation; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation as herein provided.

11th. The remedy herein given to said parties of the second part shall not be construed to deprive them or any other parties of their full rights and remedies in the several courts of law and equity in said States as they exist now or may hereafter exist, and any court of competent jurisdiction may enforce any of the provisions of this instrument.

12th. Whenever and as soon as any bonds authorized to be issued hereby shall be created, issued, negotiated, and sold, the holders of the six per cent. bonds issued by the Boston and New York Central Railroad Company, secured by their mortgage, dated March 7th, 1854, and the holders of the six per cent. bonds and mortgage notes issued
26 by the New York and Boston Railroad Company, and secured by their mortgage, dated December 30th, 1862, and each of them, shall have the right, within two years from the time when any of said bonds under this indenture shall be created, issued, negotiated, and sold, to exchange their said bonds or mortgage-notes for the bonds to be issued under this indenture, upon the following terms, to wit: upon the surrender to the Boston, Hartford and Erie Railroad Company of the said bonds of the Boston and New York Central Railroad Company, or of the said bonds or mortgage-notes of the New York and Boston Railroad Company, in sums of not less than one thousand dollars, with all the unpaid coupons, the said Boston, Hartford and Erie Railroad Company shall give in exchange a seven per cent. Boston, Hartford and Erie Railroad bond for one thousand dollars, to be issued under this indenture, drawing interest from January 1st, 1867; and for all sums smaller than one thousand dollars, certificates shall be issued, exchangeable into said Boston, Hartford and Erie Railroad Company bonds, whenever they are presented to the said Boston, Hartford and Erie Railroad Company in sums of one thousand dollars. And the holders of the seven per cent. bonds issued by the Boston, Hartford and Erie Railroad Company, and secured by their mortgage, dated February 2d, 1864, and each of them, shall have the right within the same time to exchange their said bonds for the bonds to be issued under this indenture upon the following terms, to wit: upon the surrender to said Boston, Hartford and Erie Railroad Company of said bonds of the Boston, Hartford and Erie Railroad Company, with all the unpaid coupons, the said Boston, Hartford and Erie Railroad Company shall give in exchange seven per cent. Boston, Hartford and Erie Railroad bonds, to be issued under this indenture for the amount so surrendered, with certificates, as aforesaid, for all sums smaller than one thousand dollars.

And this indenture further witnesseth, that the parties of the second part do hereby accept the aforesaid trusts, and agree to execute them upon the following terms and conditions, which are mutually
27 agreed to by the parties, namely: That neither trustee shall be answerable for the acts, omissions, or defaults of the other to which he does not give his assent; that each shall be answerable for gross

negligence and wilful defaults only; that the trustees, or either of them, may employ or advise with legal counsel, and that the expenses thereof, and all the personal expenses of the trustees in discharge of the trust, and all other reasonable and proper charges and expenses of the trustees, including their compensation, shall be paid by the parties of the first part as they are incurred, or otherwise out of the trust-estate on which they are charged; that neither shall be bound to pay or discharge any prior incumbrances on said mortgaged property or estate, nor any part thereof, without being first furnished with the means necessary to make such payments by the persons so requiring; that they shall not be required to act in the execution of these trusts except at their own option, unless requested in writing by the holders of at least bonds to the amount of fifty thousand dollars nominal par value, and also furnished with such funds as their counsel shall advise them are necessary and proper to enable them to commence proceedings, and also with a responsible and sufficient agreement to pay the current accruing expenses, obligations, and liabilities which they may incur by reason of so acting, and also a reasonable compensation to them for so doing; that when called upon to act, they shall be invested with full power to submit all questions of law or fact arising in the execution thereof to arbitrators, and also to compromise and settle any or all such questions; that they may employ agents or attorneys in fact to act for them whenever required to act themselves; and that all the covenants and agreements herein contained or implied may be executed specifically by any court of competent jurisdiction.

In witness whereof the parties of the first part have caused these presents to be sealed with their corporate seal and attested by
28 their president and secretary, and the said trustees have signed and sealed these presents the day and year first above written.

The Boston, Hartford and Erie Railroad Co.,
[SEAL.] By GEO. M. BARTHOLOMEW, *President.*
HORATIO N. OTIS, *Secretary.*

[U. S. rev. stamps.]

ROBERT H. BERDELL, [SEAL.]
D. S. GREGORY, [SEAL.]
J. C. BANCROFT DAVIS, [SEAL.]
Trustees.

Signed, sealed, and delivered in the presence of—
WM H. BALDWIN.
M. SMITH.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

{ CON'L'S } By this public instrument be it remembered, that on this
{ SEAL. } 25th day of April, A. D. one thousand eight hundred and sixty-six, before me the subscriber, Joseph B. Nones, a commissioner in and for the State of New York, appointed by the governor of the State of Massachusetts to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument to be used or recorded in the said State of Massachusetts, and to administer oaths and affirmations, take depositions, &c., &c., personally appeared George M. Bartholomew, president, and Horatio N. Otis, secretary, of the Boston, Hartford, and Erie Railroad Company, and Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees of said railroad company, the persons

described in and who executed the annexed instrument, and acknowledged to me that they severally executed the same voluntarily and freely, for the uses and purposes therein stated, as the free act and deed of said company; and the said George M. Bartholomew and the said Horatio N. Otis, being by me sworn in due form of law, on their respective oaths, say that they are president and secretary of said rail-
29 30 road company as above stated: that the seal attached to the annexed instrument is the proper corporate seal of said company; and that the same, and the signatures of said officers and trustees, were placed there by authority of the directors of said company. And I further certify that I know the persons who made the said acknowledgment to be the identical person described in and who executed the said annexed instrument.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, the year, month, and day first before written.

J. B. NONES,
Commissioner of the State of Massachusetts for the State of New York aforesaid.

The execution of the above mortgage is also acknowledged in the above form before said Nones as commissioner of the States of Connecticut and Rhode Island, and as notary public of the State of New York.

31 On the second day of September, A. D. 1872, the following demurrer was filed, namely:

Circuit court of the United States, Massachusetts district. In equity.

SIDNEY DILLON
v.
GEORGE M. BARNARD ET AL.

Demurrer of assignees in bankruptcy.—Filed Sept. 2d, 1872.

The demurrer of George M. Barnard, of Boston, in the commonwealth of Massachusetts, Charles S. Bradley, of Providence, in the State of Rhode Island, and Charles R. Chapman, of Hartford, in the State of Connecticut, as they are assignees in bankruptcy of The Boston, Hartford and Erie Railroad Company, defendants, to the bill of complaint of Sidney Dillon.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants.

Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and
32 things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

GEORGE M. BARNARD,
Assignee of B., H. & E. R. R.

LOTHROP & BISHOP,
Solicitors for Defendants.

Then appeared the above-named George M. Barnard, and made oath that the foregoing demurrer is not interposed for delay. Before me, this twenty-eighth day of August, A. D. 1872.

FISHER AMES,
U. S. Commissioner.

The undersigned, counsel for defendants, certifies that in his opinion the foregoing demurrer is well founded in point of law.

T. K. LOTHROP.

Demurrer of trustees under Berdell mortgage.—Filed Sept. 2d, 1872.

The demurrer of William T. Hart, of Boston, in the commonwealth of Massachusetts, George Talbot Olyphant, of Greenburg, in the State of New York, and Charles P. Clark, of Newton, in the county of Middlesex and commonwealth aforesaid, as they are trustees under the Berdell mortgage of The Boston, Hartford and Erie Railroad Company, defendants, to the bill of complaint of Sidney Dillon.

The defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show—

33 That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is hereby sought and prayed for from or against these defendants.

Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

W'M T. HART,
For Himself and Co-trustees.

LOTHROP & BISHOP,
Solicitors for Defendants.

Then appeared the above-named William T. Hart, and made oath that the foregoing demurrer is not interposed for delay. Before me, this twenty-eight day of August, A. D. 1872.

FISHER AMES,
U. S. Commissioner.

The undersigned, counsel for defendants, certifies that in his opinioin the foregoing demurrer is well founded in point of law.

T. K. LOTHROP,
Counsel for Defendant.

34 This cause was then continued to the October term of the court, A. D. 1872, when, the honorable Nathan Clifford, associate justice, and the honorable George F. Shepley, circuit judge, sitting, the cause was set down for hearing on the demurrers to the bill of complaint, and fully heard.

This cause was thence continued to this present term, when, on the twenty-fifth day of June, A. D. 1873, the following decree is entered, namely:

Decree.

This cause came on to be heard at the October term of this court, A. D. 1872, upon the demurrers to the bill of complaint filed in said cause, and was argued by counsel for the respective parties; and now, to wit, June 25th, 1873, upon consideration thereof, it is ordered, adjudged, and decreed that the said demurrers be sustained, and that the said
35 bill of complaint be, and the same hereby is, dismissed.

It is further ordered, adjudged, and decreed that the said defendants, George M. Barnard, Charles S. Bradley, and Charles R. Chapman, assignees, recover of the said Sidney Dillon, complainant, their costs of suit, taxed at twenty-three dollars and ninety-six cents.

And the death of George Talbot Olyphant, one of said trustees, being suggested, it is further ordered, adjudged, and decreed that the defendants, William J. Hart and Charles P. Clark, surviving trustees, recover of the said Sidney Dillon, complainant, their cost of suit, taxed
36 at twenty-three dollars and ninety-six cents.

Whereupon the complainant, in open court, claims an appeal to the Supreme Court of the United States, and gives good and sufficient security to prosecute his said appeal with effect, and to pay all damages and costs if he fail to make good his said appeal; which security is approved by the court, and said appeal is allowed accordingly.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

37 UNITED STATES OF AMERICA,
District of Massachusetts:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record, and of all proceeding' in the cause of Sidney Dillon, in equity, v. George M. Barnard et al., in this court determined.

In testimony whereof I hereunto set my hand and affixed the seal of said circuit court, at Boston, in said district, this sixth day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

[SEAL.] JOHN G. STETSON, *Clerk.*

38 *Bond to party on appeal.*

Know all men by these presents that we, Sidney Dillon, of the State, city, & county of New York, as principal, and N. C. Munson, of Boston, in the State of Massachusetts, as surety, are held and firmly bound unto George M. Barnard, Charles S. Bradley, Charles R. Chapman, William T. Hart, and Charles P. Clark in the full and just sum of five hundred dollars, to be paid to the said Barnard, Bradley, Chapman, Hart, and Clark, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately at the May term, 1873, of the circuit court of the United States, held in Boston, in a suit in equity depending in said court between said Dillon, as complainant, and said Barnard, Bradley, Chapman, Hart, Clark, (and George Talbot Olyphant, deceased before decree,) defendants, decree was rendered against the said Dillon; and the said

Dillon having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Barnard, Bradley, Chapman, Hart, and Clark, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Dillon shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

N. C. MUNSON. [L. S.]
SIDNEY DILLON. [L. S.]

Signed, sealed, and delivered in presence of—
As to N. C. Munson, H. EDGARTON.
As to Sidney Dillon, B. F. HAM.

This bond is approved.
LOTHROP & BISHOP & ARTHUR LINCOLN.
SEPT. 9, 1873.

A true copy of the bond, taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 228. Sidney Dillon, appellant, vs. George M. Barnard et al. Massachusetts C. C. U. S. Filed 11th October, 1873.

BRIEF FOR THE APPELLANT.

SUPREME COURT OF THE UNITED STATES.

No. 228.

SIDNEY DILLON, APPELLANT,

vs.

GEORGE M. BARNARD AND OTHERS, ASSIGNEES IN BANKRUPTCY OF THE BOSTON, HARTFORD AND ERIE RAILROAD COMPANY, AND WILLIAM T. HART AND OTHERS, TRUSTEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

OCTOBER TERM, 1874.

SUPREME COURT OF THE UNITED STATES.

SIDNEY DILLON, COMPLAINANT AND APPELLANT,
IN EQUITY.

VS.

GEORGE M. BARNARD, ET AL.

No. 228. October T., 1874.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLANT.

This case comes up on demurrer to the bill, and the allegations of the bill, admitted by the demurrer, are in substance as follows:

The complainant and appellant is a contractor to whom a large sum is due for the construction of the road of the Boston, Hartford and Erie Railroad Company. The first named defendants are the assignees in bankruptcy of that corporation, and the other defendants are the trustees under a certain trust indenture set out in the bill, as the successors of the trustees originally named in it. At the filing of the bill they were in possession of the property described in the trust mortgage for the purpose of foreclosure. The bill also prays that all other persons, if any, who have any claim to the fund in question may be brought in and made parties. (Record, p. 6).

The bill alleges that, March 19, 1866, the corporation by said indenture, conveyed to trustees all its property existing or to be acquired, to be held and disposed of according to the provisions of that indenture; that among other things, the indenture provided for the issue of a large amount of bonds, which, by force of the provisions of the indenture, and always subject to its provisions, were to be a lien upon the property existing and future, conveyed by the indenture. That these bonds were to be issued, and the money raised by their sale was to be used for the purpose of paying off existing liens and building and completing the road then projected and commenced but not built; that the road as then existing was of insignificant value, and that the corporation was entirely destitute of means to complete it; that it was believed

that the property conveyed and to pass by the indenture, if and when the road should be completed, but not otherwise, would be of large value and afford security for the bonds: — so that the security of the bondholders depended entirely upon values which should thereafter be acquired by the expenditure of money in the construction and completion of the road. (Record, p. 3).

That, for the purpose of attaining these objects and conferring this benefit upon the bondholders, and in order to induce third persons to enter into contracts for the completion of the road, it was specially provided in the indenture that such contracts, when approved and designated in writing by the trustees under certain powers specially conferred by the indenture for that purpose, should become a lien upon the fund to arise from the sale of the bonds, which, by force of that and other provisions of the indenture, was constituted a trust fund subject to the control of the trustees; that thereafter, Oct. 24, 1867, the complainant made the contract for the construction of the road, a copy of which is set out in the bill, and that the same was duly so approved, designated, and signed by the trustees, and became such a lien; that the fund was created and was ample to satisfy the complainant's lien, and ought to have been devoted to that purpose; that it was within the power of the corporation and of the trustees so to have disposed of it, but that, in violation of their duty, they joined in using it to acquire other property, which they now actually hold under said indenture.

The bill also alleges that the purpose, object and understanding of all the parties in making the contract with the complainant, and in approving and designating the same under the powers given by the indenture as already stated, was that the payments to become due to the complainant should be a lien on the fund in question; that he expended his money and created the property which the defendants were to enjoy and now actually do enjoy, relying on that lien, and that his reliance on it was at all times well known to the trustees and the corporation. (Record, p. 4).

To this bill all the defendents demurred, and upon a hearing before Mr. Justice CLIFFORD and Judge SHEPLEY, the demurrer was sustained and the bill dismissed. From this decree the complainant appeals, and the error complained of is that the court dismissed the bill, whereas, upon the facts stated in the bill and admitted by the demurrer, the complainant is entitled to the relief prayed for.

The opinion of the court below, pronounced by his Honor the Circuit Judge, was not prepared until fifteen months after the date of the decree, and after the appeal had been entered in this court. Accordingly it was not certified up by the clerk, but in

accordance with the spirit of the rule, printed copies of it are herewith presented.

It will be seen that this is not an attempt on the part of a contractor to assert a priority over a mortgage on the railroad which he has built. The claim here made is that the trust indenture under which all parties acquired, claim and hold the property in question, was intended to create, and did create a trust in favor of the complainant, by virtue of certain peculiar provisions and of acts done in the exercise of powers expressly given by its provisions, which he now seeks to enforce. The fund which the complainant seeks to reach is still in the hands of the original trustees, either in its original form as money, or in its substituted form as property acquired by their expenditure of the money, and now is and always has been held by them as trustees under the indenture. The contention, therefore, in effect, is between two beneficiaries under the same trust indenture, and relates to a fund which has never left the hands of the parties to the indenture, and is now held by our opponents upon no title or claim save under that indenture.

All the property which is due to our expenditures is held and enjoyed by our opponents; this, however, is shown, not as a substantive ground of claim apart from the provisions of the indenture, but for the purpose of showing that the complainant was the beneficiary under the trust relied on; that the purpose, object, and consideration of and for the creation of that trust was the acquisition of property so to be held and enjoyed; and that they have actually realized all the benefit contemplated, and will still retain all that benefit if our claim is enforced to the utmost.

Such is the general scope of the bill.

The basis on which it rests is article "sixth" of the mortgage, dated March, 1866, which is as follows:

"6th: That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of the said trustees, whose assent *in writing* shall be necessary to *all contracts* by the party of the first part, before the *same shall be a charge upon* any of the sums received from such sales." (Record, p. 13).

The bill avers that, in Oct., 1867, the plaintiff made with the company a contract in writing to construct a portion of the road, and that this contract was approved in writing by the trustees under said article 6th. (Record, pp. 3, 4).

"That the purpose, object, intention and understanding of the parties, to wit: the corporation, the trustees and the plaintiff, in procuring said approval, in making the same, and in accepting said contract so approved, was that the sums to become due to com-

plainant under that contract should be a charge upon the sums to be received from said sales of said bonds." (Record, p. 4).

"That the complainant thereafter undertook and performed work under said contract, and expended very large sums of money thereunder, relying for his compensation on the sums of money to be derived from said sales of bonds, and his lien thereon, *by virtue of the premises;* and his said reliance thereon was at all times well known to said corporation, and to the trustees under said mortgage indenture," (Record, p. 4); and that there is due him thereunder the sum of $1,030,693.29. (Record, p. 4).

Now these allegations are all allegations of fact. They are not, as has been said, "to be taken as conclusions of law from the agreement" set up by the plaintiff or his pleader.

They are facts open to proof by evidence of the contemporaneous declarations, acts and conduct of the defendants and of the plaintiff.

If they are of any weight, and are by law admissible, for any purpose, then they are, by the demurrer, confessed to be true.

We start then, before going to the question of what should be the construction of article 6th, with the distinct admission of the defence, that whatsoever may be that legal, ultimate construction, it was the "understanding, purpose and object of all parties," that by virtue of the contract and its approval in the form required, the plaintiff should and did have a lien or charge upon the proceeds of the bonds to satisfy all sums to become due him under the contract.

Whether these admissions estop the defendants from now setting up as a defence, a construction of the article which will defeat the plaintiff's claim, will be the subject of future discussion.

The use we desire now to make of these admissions is, that if a careful scrutiny of the terms of the contract with the other aids to its construction shall leave that construction doubtful, then the confessed contemporaneous construction of all parties, and the grave acts of the plaintiff admitted to have been done under that construction, and to have been known to the defendants to have been so done, will tend to remove the doubt.

Noonan *v.* Bradley, 9 Wall. 407.

I.

We turn then to the question as to what (aside from these admissions) is in legal contemplation, the true force and effect of the language constituting this 6th article.

Before doing this, it is necessary, however, to determine with certainty whether the proceeds of the sales of that portion of the

R.R. Co. *v.* Trimble, 10 Wall., 377.
Stone *v.* Clark, 1 Met., 381.
Livingston *v.* TenBroeck, 16 Johns. R., 22.

bonds which the complainant seeks to follow, were to be and were held in trust for any purpose whatever, and by whom.

An inspection of the mortgage shows that it was framed in complete distrust of the fidelity of this faltering corporation, and in reliance on the trustees, in the application not only of the portion of the bonds which, or their proceeds, were to be applied to the extinguishment of existing liabilities, but also as to the use of the proceeds of the sales of the residue of the bonds. To insure safety as to the first-named portion of the bonds, they were placed in trust, as shown by article 3d, thus:

"3d. That of the whole issue hereby authorized to be made of said bonds there shall be retained in the hands of said parties of the second part, such amount of said bonds as shall be equal to the whole amount of the bonds and mortgage-notes outstanding from time to time, which are a lien upon any of the property or franchises hereby conveyed, which are to be delivered to the parties of the first part only on the cancellation of a corresponding amount of said outstanding bonds or mortgage-notes." (Record, p. 12).

To insure the application of the proceeds of the sales of the residue of the bonds, those proceeds were by article 6th above recited, to be held by the corporation in a trust, under which no expenditure of that part of the same designed to be used in purchases and other cash payments, in the work of completing the road, was to be made without the *oral* approval of at least one of the trustees, while as to all *executory contracts*, the assent in writing, as we construe it, and as the action of the trustees shows, was a prerequisite to the application of the proceeds thereto.

This, we think, establishes that all the bonds, and their proceeds, embraced in the mortgage, were carefully and designedly placed in trust. Had the company become bankrupt, no part of the bonds or their proceeds would have formed part of their general assets.

Parker *v.* Muggridge, 2 Story, C. C. R. 345.

An agreement between mortgagor and mortgagee, that a sum advanced by the latter shall, with a view to create or make better the security of the mortgagee, be held and applied by the mortgagor, under the supervision of the mortgagee, to augment the value of the mortgaged estate, makes, as between the parties, the fund a trust fund. Any diversion of it would be a violation of trust, and be restrained by a court of equity. The word, "trust," is wholly unimportant. Any terms that create a fiduciary relation are enough.

Pennock *v.* Coe, 23 Howard, 129.
King *v.* Denison, 1 Ves. & B., 273.
Legard *v.* Hodges, 1 Vesey, Jr., 477.
Bagshaw *v.* Eastern U. R. R., 2 MacN. & G., 394.

II.

Coming then to the question, whether, under the just construction of the words of the trust contained in the 6th article, parties making written contracts to construct and equip the road were intended both by the company and the trustees, on compliance with its terms, to be secured by it, the surrounding circumstances are to be first carefully regarded. These circumstances are disclosed both by the bill and by the mortgage, and admitted by the demurrer, and are,

"That prior to the mortgage the road of the corporation was of small value, because not completed . . . and the said railroad corporation was destitute of means to complete the same." (Record, p. 3). That in addition to its being of small value, it was subject to mortgages to such an extent that to discharge the same and complete the road required a farther loan of $20,000,000. Here then was a corporation with an unfinished road of small value in itself, and in addition deeply mortgaged, destitute of means to make such completion, and thus clearly with no credit, proposing a new mortgage of 20,000,000 of dollars, which would have priority to any claims of contractors. How do these circumstances weigh upon the construction of a provision in the mortgage, (should the terms of that provision appear doubtful), whether there was an intent to provide, out of the sales of the new bonds, security for any one, who would venture to contract to complete the road? Do they not tend to support the allegation of the bill, that the clause was inserted in order "to induce other persons to enter into contracts for the construction and completion of said railroad," which allegation the demurrer admits? (Record, p. 3).

It is to be considered also that not only would it be highly improbable that any contractor would agree to embark his means and labor upon the mere credit of such a corporation, but that there was every inducement, both to the mortgagees and the company, to make an arrangement by which the proceeds of sales of bonds should furnish security for such contract. The mortgagees would thereby hold out inducements to contractors, without which they could hardly hope that any one would make such contracts, to complete a road on which completion their whole security rested. To the company it afforded the same inducements, viz., that by such provision only could contracts to complete the road be obtained, while it did not change or add to the burthens of the trust under which the fund was held.

III.

Next, as to the legal construction of the article itself, or the clause in the mortgage on which the controversy arises.

First: As we have shown, there is nothing in the surrounding circumstances, nothing in the terms, recital or scheme of the mortgage itself which tend to the conclusion that the language of article 6th was inadvertently used, nor that when it declares that the written assent of the trustees "shall be necessary to all contracts made by the party of the first part, before the same shall be a charge upon any of the sums received from the said sale," it was never designed that such contracts should, in any event whatever, be made so as to be a charge upon the sums thus received.

The instrument shows on its face that it was drawn, devised and completed by competent counsel, and the leading trustee is known as an exact and skilful lawyer, who, if he is not shown by the record to have drafted it, never could have executed it without a careful scrutiny of provisions involving, on his part, such large responsibility.

Second: If then, there be nothing in the surrounding circumstances, nor in any other part of the mortgage to lead to the necessary belief that the words used ought not to be held to express the true intent of the parties, then we submit that the words, upon settled principles, must receive their natural force and meaning, and that the construction must be such that every word used by the parties shall be made effective,— nothing rejected, nothing added, — unless, on its face, any of the language used is repugnant to some other parts.

If we are right in this, then it is too clear for controversy, that the article contemplates "*a charge*" in favor of some person "*upon* the sums received," whensoever contracts of the description referred to shall be made and approved in writing by the trustees.

Third: The next inquiry is, who are the person or persons in whose favor that charge upon the conditions prescribed was to arise?

It will not be suggested that the language rightly construed, imports the creation of a charge in favor of the corporation itself.

The corporation already, from the start, held the funds in its own hands in trust for the same purpose, with the right and duty so to apply it. The formality to create a charge upon it in favor of the company as fast as it executed contracts, to carry into effect their already prescribed trust duties, would be idle and superfluous.

We submit that the character of the charge to be created, points conclusively to the parties for whose benefit it is created. That

charge is to be of the "*contract made*," not merely of the fixed periodical payments to be made under it. It may involve all other incidental pecuniary claims so commonly arising in the course of carrying out such a work. None but the contractor would have any interest in having the *contract* itself made a charge upon the fund.

And if the contract, when designated by the signature of the trustees, is to be a charge upon the fund in favor of any one, it is difficult to see how a court of equity can deny to the contractor who alone is to receive the fund appropriated, the right to enforce that charge.

But be this as it may, the bill avers (Record, p. 4), that the plaintiff acted with full knowledge of the clause authorizing, as we claim, a charge of his contract on the fund, and was known by the defendants to have so acted, and to have expended his labor and means on the faith of it.

This the demurrer must be deemed to admit.

The fact, then, to be derived from the admission made that the plaintiff knew of the provision relating to the charge of drafts on the fund, and relied upon it, as security, and that this reliance was known to the trustees and the corporation, disposes of the question as to the plaintiff's affirmation of the trust and notice to the party holding the trust fund, and that all steps necessary on the part of the plaintiff to enable him to avail of it, were taken by the plaintiff.

But the proofs (aside from the admission of the demurrer,) show that the plaintiff knew of the provision, acted in faith of it, and was known to do so, both by the company and the trustees.

If the plaintiff had accepted and acted upon the contract as first signed by himself and the corporation alone, he would be deemed to have contracted on the credit of this embarrassed company; but immediately thereafter it received the written approval and assent of the trustees; it was afterwards delivered to him and then, for the first time, became a contract, and thereafter he entered upon the execution of his work under it. (Record, p. 4).

Why was this approval procured, made and accepted by these two parties and the complainant? Upon the theory that it gave him no charge upon the fund, it was an idle and a purposeless act. *There was already the valid contract of the corporation. Upon the defendants' theory the written approval of the trustees gave him nothing more*, and why did the trustees go through the formality of making a written approval which they knew or supposed, gave no additional force to the contract or security to the contractor?

It follows, as a necessary result, that the acts of both plaintiff and the trustees were in compliance with the 6th article of the

mortgage, and thus that it was known to him; and further, that the trustees, when the contract was presented to them for their written approval, knew and understood that the plaintiff had a motive for procuring that approval, and that that motive was to give him some advantage or security which he would not possess without it.

Can the trustees or the company be heard to say that they did not understand that this advantage and this security were a charge upon the trust fund under the 6th article?

Finally, the provisions of the indenture coupled with the written approval of the contract in pursuance of them, give to the trust relied on that certainty of subject and of object which is necessary to its enforcement, and which of itself is deemed to be ground for inferring the existence of a trust from words doubtful in themselves.

Paul *v.* Compton, 8 Ves., 380.
Morice *v.* Durham, 10 Ves., 536.

Thus far as to the existence of the trust, and as to the aids to its construction derived from the surrounding circumstances, and from the contemporaneous admissions, as to its true intent, by the defendants, and finally, as to the legal interpretation of the article construed by itself.

IV.

We proceed next to state the grounds on which, as we understand them, the construction of the contract on which we rely was combatted by the defendants and overruled by the court below.

The first contention of defendants is, that either the general purpose of the indenture or some of its provisions are so repugnant to, or inconsistent with the design to provide for the creation of a charge in favor of contractors on the fund in question, as to compel the courts to deprive the words used in the controverted clause of their natural force and meaning, and to construe them as a covenant, merely designed to place additional safeguards upon the use by the company of the trust fund. A covenant, it is said, to which the plaintiff was no party, and with which he could not subsequently connect himself.

In support of this view, reference is made to various recitals in the mortgage, which, it is said, declare its sole purpose to be to secure the bonds issued under it, and also to the bonds themselves which declare that the mortgage "is to be a first and only lien on the property and franchises of the company." Also, to the fact that there is no provision in the mortgage, imposing on the trustees the duty of marshalling the fund so as to secure a proper priority among contractors. It is even said by defendants that

there is nowhere manifested in the mortgage any intent to secure contractors.

Now, we admit the full force of the recitals showing that the primary purpose was to secure the bonds by completing the road, and that the trustees were charged with the duty of carrying out this purpose. That the required assent of the trustees to executory contracts was for the purpose that they should control the expenditure of the fund so as to add to the security of the bondholders. But it is not perceived how all this is inconsistent with the auxiliary purpose that the trustees might assent that proper contracts for construction, when approved by them, *should be a charge upon the fund thus exclusively devoted to, and held in trust for the very purpose of paying the contractors.* Nor does the recital that the bonds should be a first and only lien "on the property and franchises of the company," seem to be weighty in support of defendants' construction. It obviously refers to the period of the completion of the road, and is in no way repugnant to the provision that the contractors should, with the assent of the trustees, have a lien, *not "on the properly and franchises of the company," but on a trust fund devoted to secure the completion of the road.*

See U. S. *v.* New Orleans R. R., 12 Wall. 364.

The suggestion that the mortgage does not contemplate that "either the trustees or bondholders should see that the assets were marshalled," so that they should be applied to the discharge of contracts in the order of their priority, does not seem to plaintiff to be of grave importance in settling the construction of the clause in controversy. No express provision on this subject was to be looked for. The duty of administering the fund so as to preserve all just priorities, rested *primarily* on the company, who were trustees and administrators of that fund, subject to the supervision of the mortgage trustees, — a duty which resulted from their position, and which it was not requisite to set out or declare.

If defendants' assertion that there is nowhere manifested in the indenture an intent to secure contractors, means to except the clause in controversy, it is correct; if not, then it merely begs the question. That there is nothing repugnant to such intent throughout the indenture, we have shown.

But the substantial reliance of the defence seems to be on the proposition that, giving to the words of the clause their plain and ordinary significance, and conceding that they do relate to a charge or lien to be given to contractors, yet it is said that the clause does not, of itself, create such charge, but merely authorizes its creation; and that to create the same, something more is necessary than that a contract to complete the road should be assented to in

writing by the trustees. The ground then is, that, as the contract itself of the plaintiff with the company does not contain any agreement that it or the sums to become due under it, shall be a charge or lien upon the trust fund, and as no machinery for enforcing such charge or lien is set out in plaintiff's contract, the written assent of the trustees means nothing more than that they approved the expenditure, and thus no charge or lien was so created.

This proposition, it will be seen, assumes that the instrument, rightly construed, *does* provide for a mode by which, with the assent of the trustees, a charge or lien on the bonds or fund set apart to complete the road may be given to contractors, but it asserts that the parties omitted the necessary form to bring the plaintiff within the provision, and thus not only no such lien was created, but none was contemplated in the plaintiff's case.

To this we answer, that there is nothing on the face of the clause which provides that only contracts which contain a provision to that effect, shall be secured by such lien; nor that contracts, to be secured, must contain provisions for working out the lien. It merely declares that, to all contracts, before the same shall be a charge, the written assent of the trustees shall be necessary. Unless, therefore, it be a necessary legal result or implication that only contracts expressly providing for such lien can be embraced by the clause, the objection must fail.

We submit that the agreement that plaintiff's contract should be thus secured, need not even be evidenced by any writing in, or outside of the contract; and further, that the facts disclosed, (aside from the admission of the demurrer,) establish in writing, and beyond all reasonable doubt, that it was agreed that it should be thus secured. These facts are:

That there existed between the plaintiff and the company a written contract for the completion of a part of the road, under which contract, if no further steps had been taken, plaintiff had no other security than the credit or promises of this faltering corporation.

It is admitted that, under the mortgage, a fund was, by contract between the company and the mortgagees, set apart to be by the company applied exclusively to the completion of the road; and it is further admitted that, by a clause in that mortgage, this fund *might*, with the written assent of the trustees, be subject to a charge in favor of contractors.

When, therefore, it is shown that after the execution of plaintiff's contract, and in exact and literal compliance with the conditions required by the mortgage to subject the fund to such charge, the trustees have, by a written endorsement, "approved and assented to" plaintiff's contract, and when it is seen that the procuring such written approval would be otherwise purposeless on the part

of the plaintiff, and an idle ceremony on the part of the trustees, it would seem not to be open to controversy that those proceedings were, and were intended, to constitute and perfect an agreement of all parties that the contract in question should be a charge on the fund.

In Stevenson *v.* Austin, 3 Metcalf, 474, it was held that a lien was to be enforced in favor of a third party, as being intended from the nature of the transaction, although there may be no words or provision in the contract referring to such lien.

The objection that the want of a provision as to the mode of working out the lien shows no ljen to have been intended, cannot be of importance. It may, without hesitation, be affirmed that, in the numerous cases of commercial and other contracts, where liens are given, in terms, or are inferred by a court of equity, few, if any, provide the machinery for their enforcement. All parties know that the law furnishes a complete and adequate remedy, and this mortgage expressly recognized a resort to a court of equity, as a means of enforcing its provisions. (Record, pp. 15, 16).

V.

Thus far the argument has been confined to the force and effect of the terms, "before the same shall be a charge upon" the proceeds of the bonds, and to the contention of the defendants in relation thereto.

But it is wholly unnecessary for the plaintiff to rely on the strict or technical interpretation of those terms. Whether it was expressly intended thereby to execute the "charge" or not, yet no construction of the whole clause can exclude the manifest purpose of the trustees to give their consent that the fund held in trust by the corporation, to build the road, might be applied to satisfy the plaintiff's contract. Nothing can be clearer than that it was the purpose of the plaintiff that by the procurement of that assent some advantage should accrue to him, not given him by his mere contract with the corporation, and as the bill avers that the complainant and the railroad company executed the agreement which was approved and assented to by the trustees in writing, "and *afterwards* the said contract with said approval was delivered to the complainant," (Bill, p. 4,) it is equally clear that the assent of the trustees was procured by the corporation with the purpose of manifesting their consent that plaintiff's contract should be satisfied out of the trust fund; otherwise their act in procuring said assent would be perfectly futile. Accordingly, the bill avers that such was the purpose of all the parties, (Record, p. 4, § 8,) which the demurrer admits.

In this state of things, and after the plaintiff, under that con-

tract, had performed the work of which the Berdell mortgagees reap the benefit, for the Berdell trustees to combine with the railroad company to withdraw the fund, or any necessary part of it, from the reach of the plaintiff and divert it to their own enrichment, would be, *in effect*, a revocation of that consent so far as the plaintiff is concerned, and more wrongful so far as the Berdell trustees are concerned.

Giles *v.* Simonds, 15 Gray, 443.

Equity will treat the fund thus diverted, as if it were in its proper place.

If a fund be set apart, out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that the fund shall not be withdrawn, by those who set it apart, to the injury of such creditors.

Curran *v.* Arkansas, 15 How. 304, 314.
Eastman *v.* Foster, 8 Met. 19.
Rice *v.* Dewey, 13 Gray, 49.
New Bedford Bank, *v.* Fairhaven Bank, 9 Allen, 178.
Curtis *v.* Tyler, 9 Paige, 435.
Moses *v.* Murgatroyd, 1 Johns. Ch. 129.
Hawthorne *v.* Calef, 2 Wall., 20.

And these cases show, that when a fund has been appropriated to a specific object, that appropriation cannot be revoked to the injury of a creditor, though he was in fact no party to the original appropriation.

See, also, Bank *v.* Guttslick, 14 Pet. 31.

"A fourth kind of fraud may be collected and inferred in the consideration of this Court from the nature and circumstances of the transaction as being an imposition and deceit on the other persons not parties to the fraudulent agreement. . . . . Particular persons in contracts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons who stand in such a relation to either as to be affected by the contract or the consequences of it." LORD HARDWICKE, in *Chesterfield* v. *Janssen*, 2 Ves. Sr., 156, and Story's Eq. § 188.

Upon the doctrine of *Hawes* v. *Merchant*, 1 Curtis, C.C., 142, it is not material whether the Berdell trustees actually participated in this wrong-doing at the time, or now merely seek to retain the fruits of a wrong committed by the corporation alone.

S. P. Mestaer *v.* Gillespie, 11 Ves. 638–9.
Heath *v.* Crealock, 10 L. R. Eq., 31.

But the bill (Record, p. 4, § 10,) alleges, and the demurrer admits, active participation on their part.

VI.

The plaintiff does not care to discuss at length that portion of

the defence which asserts that if a lien or charge claimed by plaintiff existed, yet that the trust fund affected by that charge cannot in equity be followed into the hands of the trustees who created or assented to the charge, in competition with, or priority to the claims of the bondholders.

This line of defence is placed on the ground that the bondholders have an equity prior in date, of which the plaintiff had notice; that the plaintiff had no direct lien upon the road, by virtue of his contract, and that to allow him to follow trust funds wrongfully applied to its construction, would enable him to establish indirectly such a lien; that to sustain plaintiff's claim would be to hold the bondholders bound to see to the application of the purchase money; and finally, that the bill does not show that the bondholders have in fact had any farther expenditure made upon the mortgaged property than they were entitled to have.

In plaintiff's view, it will be a sufficient answer to these objections to state:

First: That the equity of the bondholders, which is prior in date to that of plaintiff, is to have the whole proceeds of the bonds in question applied to the construction of the road. But surely, they can set up no equity to hold and enjoy plaintiff's labor and expenditures on a part of the road to an amount equal to that portion of the bonds which should have been applied in payment for the same, and also to hold and enjoy the actual proceeds of the same bonds, because they have been wrongfully applied to complete and equip another portion of the road to which their mortgage attaches. That the bill charges this state of facts and these results, cannot, by verbal criticism, be made doubtful.

Second: That the attempt of defendants is, in substance, to set up an equity in behalf of the bondholders as purchasers for a valuable consideration without notice, and so that the trust funds, which have wrongfully reached the hands of the trustees, cannot be followed, —an attempt which we think must fail. Each bondholder, when he purchases, in legal contemplation, is affected with notice of the contents of the mortgage. He knew then, of the existence and character of this trust fund for contractors, and the dealings with it. (Cordova *v.* Hood, 17 Wall. 8). The trustees under the mortgage were, by his contract, his representatives. Those trustees were bound to superintend the administration of the trust fund. Their knowledge bound him.

Steele *v.* Stuart, 2 L. R. Eq., 92.
The Distilled Spirits, 11 Wall. 366.

He purchased such equitable interest as the indenture created in his favor, and no more, and it cannot be admitted that he acquired, or expected to acquire a value which the trustees under that indenture were, by the terms thereof, bound to hold for

another, but in defiance of their trust have undertaken and now try to hold for him. To concede that, would be to concede that a breach of the trust necessarily carried its own absolution with it, in favor of the parties to the instrument which created it.

Heath *v.* Crealock, 10 L. R., Ch. 31.

But further, how can bondholders bring themselves into the category of purchasers for valuable consideration? How have they altered their position, or what money have they paid on the faith that this misapplied trust fund was the property of the company? Again, how can a party under a demurrer set up the ground that he is a *bona fide* purchaser? This defence is a new case, founded on a right and title to be alleged and proved in all its elements.

Boone *v* Chiles, 10 Pet. 211.

And finally, the bill charges that both "the said trustees and the said corporation did wrongfully permit and suffer the money which ought to have been paid to complainant as aforesaid, to be expended for other purposes, and in particular they permitted and caused the same to be expended in acquiring new property to be held under said indenture," &c. (Record, p. 5).

VII.

The suggestion of laches has nothing to rest on.

The bill alleges, "that at the time complainant's debt fell due," the company was insolvent, (Record, p. 5). The period when plaintiff's debt fell due is fixed by the allegation that the interest on the debt to him began to run January 1, 1870, (Record, p. 4): the petition in bankruptcy was filed October 21, 1870, (Record, p. 2). There is nothing which, looking to the perplexities arising from this state of facts, can lead to the imputation of laches. Nor is there any presumption that plaintiff at once learned how the trust fund had been misapplied, so that he could trace knowledge of that misapplication to parties affected with notice, and thus be able to follow it.

And finally, it is a settled doctrine of courts of equity, that "delay in taking proceedings is not material so long as matters remain in *statu quo*." (Kerr, Injunctions, pp. 206, 574).

Respectfully submitted by

S. BARTLETT,
J. J. STORROW,

Of Counsel for Sidney Dillon, Complainant and Appellant.

BOSTON, February, 1875.

No. 228. Oct. T. 1874

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

SIDNEY DILLON,

COMPLAINANT,

v.

GEORGE M. BARNARD ET AL.,

DEFENDANTS.

OPINION OF THE COURT.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1874.

Circuit Court of the United States,

MASSACHUSETTS DISTRICT.

IN EQUITY.

SIDNEY DILLON *v.* GEORGE M. BARNARD ET AL.

BEFORE CLIFFORD & SHEPLEY, JJ.

OPINION OF THE COURT.

[SEPT. 3D, 1874.]

SHEPLEY, J.

This case is presented on a demurrer to the Bill in Equity. The material averments of fact which the demurrer admits are as follows: —

That the Boston, Hartford and Erie Railroad Company, a corporation duly existing under the laws of Massachusetts, Rhode Island, Connecticut and New York, was, prior to the first day of March, 1866, authorized to construct, maintain and operate a railroad in each of said States, and owned the railroad and franchises described in the bill; that for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the railroad of said corporation, and for the purpose of completing and equipping their railroad, then only partly constructed, the corporation, by a mortgage deed or indenture in trust, on the nineteenth day of March, 1866, conveyed to Robert H. Berdell and others, trustees, all its property then owned and after to be acquired, in trust, upon the terms and for the purposes set forth in the mortgage deed, which indenture in trust or mortgage was ratified and

validated by the legislation of the several States of Massachusetts, Rhode Island, Connecticut and New York.

The bill alleges that, among other things, it was provided in the indenture that certain bonds or evidences of debt, to an amount named in said indenture, should be issued, sold and disposed of as the means, and for the purpose of raising money to complete and equip the road; that such bonds attested by the trustees should be secured by said indenture, and become a lien upon the property therein described and conveyed, and also upon all the property afterwards purchased, and on the increase of value in the railroad given to it by the expenditure of the money raised by the sale of the bonds. It is also alleged that it was agreed by said indenture, and was a part of the trusts and terms under which the trustees held and were to hold the trust estate, that the expenditure of all sums of money realized from the sale of the bonds issued under the mortgage should be made with the approval of at least one of the trustees, whose assent in writing should be necessary to all contracts made by the railroad corporation for the purposes aforesaid, before the same should be a charge upon any of the sums received from such sales, and also alleges "that such contracts, to be assented to, should and would be a charge upon such sums so received and realized by or from such sales." This last averment must be understood as the allegation of what complainants claim to be the legal inference resulting from the terms of the contract, as no such provision is anywhere expressed in terms in the mortgage, which is made part of the bill and the record in the case.

Afterwards, on the 24th of October, 1867, the complainant Dillon entered into a contract with the corporation in writing, which was approved and assented to in writing by the trustees, for the construction of a certain portion of said road. It is alleged to have been the purpose, object and intention of the corporation, the trustees and the complainant, that the sums becoming due under the construction contract should be a charge on the sums to be received from sales of the bonds; that the complainant performed work and expended large sums of money under the contract, relying for his compensation on the sums of money to be derived from sales of bonds, and upon a lien thereon, by virtue of the premises, and that

his reliance thereon was well known to the corporation and the trustees; that his work under the contract was performed and accepted and approved in accordance with the stipulations in the contract, and that a balance is due to him of one million thirty thousand six hundred ninety-three $\frac{29}{100}$ dollars, with interest. The bill alleges that instead of devoting the proceeds of the sale of the bonds to the payment of complainant, the corporation and the trustees suffered the money to be expended in acquiring new property to be held under the indenture, and in improving and increasing the value of the property already held under it, and that the value of the new property acquired and the increased value of the old property held under the indenture, greatly exceeded the amount due to the complainant. The defendants, Hart, Oliphant and Clark, became legally the successors of Berdell and others, as trustees under the mortgage, and, before the filing of the bill, entered into possession under the mortgage of all the property covered by it, and commenced proceedings to foreclose the same. The corporation is alleged to be insolvent and without means except the property covered by the mortgage, and as in Bankruptcy, and the assignees in bankruptcy are made defendants.

In substance, the claim of the complainants is, that the money received from the sales of the Berdell bonds was to be expended in building and equipping the railroad, which was to be held by the trustees in mortgage, as security for the bondholders; that a part of the money due to the complainant for building the railroad, which has passed into the possession of the trustees under the mortgage, has been withheld from him and applied to the purchase of other property, which the contract did not contemplate should be bought and conveyed to the trustees, but which has been conveyed to them; and the complainant seeks to follow this property upon the ground, as he claims, that the contract between him and the corporation, in connection with the terms and conditions of the mortgage, constituted in equity a charge upon the sums received from the sales of the bonds. As far as possible, the averments of matters of legal inference and of conclusions of law and of the construction of documents, have been omitted in the statement of the allegations in the bill of complaint. The demurrer does not admit the truth of

such allegations, but only such facts as are well pleaded. 2 Mitford, Eq. Pleading, 227; Story, Eq. Pleading, 452; Daniell, Ch. Pl. 560; Commercial Bank of Manchester *v.* Buckner, 20 Howard, 108; Ford *v.* Perring, 1 Vesey, Jr., 72. So far as the allegations in the bill are concerned which set up what are alleged as understandings between the parties, whether they refer to matters contained in the written agreement or indenture, and may be taken to be averments of conclusions of law from the agreements, or whether they refer to parol agreements incompatible with the written agreements, the questions as to the correctness of the legal conclusions in the one case, or the admissibility of the parol evidence in the other, are open to the defendants on demurrer. Lea *v.* Robeson, 12 Gray, 280.

The mortgage in trust, after reciting the authority given to the directors of the company to make a mortgage upon the whole or any portion of the road and to issue and dispose of their mortgage bonds to the amount of twenty millions of dollars payable in New York, excepting such portion as the directors should authorize to be payable in London in sterling currency, declares the purpose of the mortgage to be to secure the "bonds to be issued for the purpose of providing for and retiring all the existing mortgage debt and prior liens upon the line of the road of the party of the first part, and for the purpose of completing and equipping their road and of laying down a third rail so as to form an additional track corresponding with the gauge of the Erie Railway of New York." The form of the bonds to be secured by the mortgage was recited in the mortgage deed. Each bond to be issued contained a statement on its face that it was one of a series of twenty thousand bonds issued for the purpose of paying the existing debt of the company and of completing and equipping their road. The bond also on its face purported to be secured by a mortgage of the railroad and franchises, furniture and equipment of the company to the trustees "which is to be the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired, to meet which a corresponding portion of this issue of bonds is placed in trust in the hands of said trustees."

Again, the indenture itself declares "that the parties of the first part for the better securing and more sure payment of the sums of

money mentioned in the said mortgage bonds and each of them according to the tenor thereof" . . . have granted, etc., to the parties of the second part, *i. e.* the trustees, all and singular the railways, etc., describing the railways and lands of the corporation with all the personal property and privileges, franchises, leases and charters, "also all the like estate, roads, railroads and structures and matters and things pertaining or belonging thereto, that may be hereafter acquired or constructed or belong to or be controlled by the party of the first part." The indenture then witnesseth that it is made and the mortgage bonds and obligations intended to be secured by it are made, executed and delivered upon the terms, conditions and agreements following, the most important of which, and the one upon which the complainant principally relies, is the *sixth* condition in the indenture. "6th. That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales."

The allegation in the bill is that it was agreed by the indenture "that such contracts so assented to should and would be a charge upon such sums so received and realized from such sales." There are no such words in the indenture. The allegation therefore is one of those allegations of conclusions of law or legal constructions of a document which are not admitted by, but are open on the demurrer. Upon a careful consideration of the whole indenture, its scope, intent and purpose, and especially of the sixth clause, in which alone the word "charge" is used, it must be determined whether that word was used in its strict and technical sense, or only in a more general sense in a covenant that the corporation itself would make no expenditures of any money realized from the sale of the bonds or any contract calling for such expenditure, without the approval of one of the trustees. This sixth clause in the indenture is a covenant on the part of the corporation, party of the first part, with the trustees for the bondholders, party of the second part, a covenant, the intent and purpose of which was in aid of what is declared to be the purpose of the indenture itself, "for the better secur-

ing and more sure payment of the sums of money mentioned in said mortgage bonds and each of them according to its tenor."

Therefore, as the money from the sale of the bonds was to be raised for the purpose of retiring existing mortgage debts and prior liens on the mortgaged property, and for the purpose of completing and equipping the road and laying down a third rail, the corporation provided for the application of a portion of the bonds to the retiring of existing prior incumbrances by the provision in the indenture for placing the bonds requisite for that purpose in the control of the trustees, thus adding to the security by the extinguishment of prior liens, and requiring the assent of the trustees to expenditures and contracts for expenditures that they might have the power so to control them that the proceeds of the bonds should be expended in such a manner as to further the purpose of the mortgage by adding to the security of the bondholders.

The trustees were bound to see that the expenditure would tend to "the better securing and more sure payment of the mortgage debt," and also that it was for one of the purposes declared in the mortgage. There is no allegation that the expenditures approved by the trustees were for purposes other than those declared to be the purposes of the indenture or that they did not tend to "the better securing and more sure payment of the sums of money mentioned in said mortgage bonds."

It is not charged that the expenditures were for purposes other than those "of completing and equipping the road and laying down a third rail," or that they impaired the security of the bondholders. On the contrary, the averment is that they "caused the same to be expended in acquiring new property to be held under said indenture and in improving and increasing the value of property already and since always held by said trustees under said indenture." This was the very purpose of requiring the assent of the trustees to the contracts and expenditures that they should be devoted to acquiring new property and adding new values to the old property held and to be held under the mortgage.

Examining the question, therefore, first in the light given in relation to the duties of the trustees by the terms of the trust indenture itself, their full duty would seem to have been faithfully discharged

when they approved only such expenditures or contracts as extinguished prior incumbrances, or otherwise bettered the security of the bondholders by such "completing and equipping their railroad" as added to the value of the old or resulted in the acquisition of new property to be held under the mortgage. The mortgage itself clearly does not contemplate that if the trustees approved several distinct contracts for the completion of distinct portions of the road and also others for equipping the road, that either the trustees or the bondholders were to see that the assets were marshaled and the sums realized from the sales of the bonds ratably apportioned among the several contractors or paid to them in the order in which their contracts were executed or in the succession in which they became due and payable, or that the trustees were to receive or have control of the bonds or the proceeds of the sales of the bonds so as to be able to make such appropriation, except perhaps in the case of the bonds set apart for the retiring of the then existing mortgage debt and debts which constituted a lien on the property. The corporation itself only covenanted that it would so expend the moneys received from the sale of the mortgage bonds as to add to the security. This is the substance of their covenant, and it is not the subject of complaint in this Bill that the mortgage security has been diminished, but that it has been added to and increased, as complainants claim wrongfully increased, not however to the injury of any parties to the indenture, but of one of the persons who, subsequently to the trust mortgage, contracted with the mortgagor.

The sixth condition in the mortgage does not of itself create any charge upon the money proceeds of the sales of the bonds. If the word "charge," in this proviso, is to be construed as used in its strict and technical sense, then it is simply a covenant on the part of the corporation that it will not create such a charge upon the money proceeds without the assent of the trustees. It is not a creation of a charge by the assent of the trustees, but a covenant not to create a charge by the act of the corporation without the assent of the trustees. The corporation had the power, by taking the requisite steps, to create a charge upon the money proceeds. The money was to be expended by the corporation, not by the trustees. It was in the power of the corporation to expend the money for any contract

it should choose to make, approved by the trustees, for equipping and completing the road. It was in its power to create, by agreement between all the parties, a charge upon the moneys in favor of any one or of all the contractors, but under the limitation of the sixth clause it could not do so without the assent of the trustees. But even with the assent of the trustees, to create such a charge upon so fugitive a subject of charge as money which has no ear-mark, it would require evidence of the most unmistakable language in whatever agreement or indenture is relied upon to establish the charge. There certainly is no such agreement in this indenture. It is not enough to create such a charge that the property may have been acquired or the fund created through the efforts or outlays of the party claiming the lien. Wright *v.* Ellison, 1 Wall. 16. Where, then, are we to look for the evidence that the corporation itself has agreed to create such a charge, and that the trustees have assented to such agreement?

The complainant was not a party to the indenture, and prior to the filing of the bill does not claim to have asserted any rights under it. The contract of the complainant with the corporation for the construction of a portion of the road does not undertake to create, and does not create, any charge upon the money proceeds of the bonds. No agreement is therein made for any such charge or lien, nor can it be seriously contended that any such charge or lien is created by any necessary implication from the terms or the scope of the contract. The assent of the trustees to the contract, therefore, was no assent to an agreement for a charge on the funds, there being no such agreement in the contract. Nor was it in the power of the corporation and the trustees combined to create a charge or lien on the property covered by the mortgage which would take precedence of that of the trustees of the bondholders, which, by the express declaration in the indenture itself, was to be "the first and only lien on the property and franchises of the company." The bondholders advanced their money upon the faith of the security on the existing property and value of the road and its appurtenances, and the property and value to be added by the expenditure of the money advanced by them. The mortgage assumed to secure them on "the like estate, roads, railroads and structures, and matters and things

pertaining or belonging thereto that may be hereafter acquired or constructed, or belong to or be controlled by" the corporation. These several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. Galveston R. R., 11 Wall. 459; Dunham *v.* Cincinnati R. R. Co., 1 Wall. 256; Pinnock *v.* Coe, 23 Howard, 117.

As no property has been acquired under the mortgage, except such as by its terms was to be subject to the first and only lien under the mortgage in favor of the bondholders, the "charge" in favor of complainant, if any agreement for such charge had been made, and if such agreement had been assented to by the trustees, would have been subordinate to the first lien created by the indenture. The advances made by the bondholders were made upon the faith of such security, and the fact that plaintiff's labors had added to the security of the bondholders would not subordinate their lien to his if he had one. Mason *v.* Y. & C. R. R. Co., 32 Me. 82; Willuck *v.* Morris Canal Co., 3 Green Ch. 377; Galveston R. R. *v.* Cowdry, 11 Wall. 459; Dunham *v.* Cincinnati R. R., 1 Wall. 256.

Demurrer sustained. Bill dismissed with costs.

Supreme Court of the United States.

SIDNEY DILLON

vs.

GEORGE M. BARNARD ET AL.

BRIEF FOR DEFENDANTS.

BY

C. S. BRADLEY.
W. G. RUSSELL.

Supreme Court of the United States.

No. 228.

SIDNEY DILLON

v.

GEORGE M. BARNARD *et al.*

BRIEF FOR DEFENDANTS.

This case comes before the court upon a general demurrer for want of equity.

The defendants submit the following analysis of the plaintiff's bill, in which they seek to discriminate between the allegations admitted by the demurrer, and those which they do not consider to be so admitted.

Allegations admitted by the Demurrer.

The facts alleged in the bill and admited by the demurrer are substantially these:

The Boston, Hartford and Erie Railroad Company, a corporation existing under the laws of Massachusetts, Rhode

Island, Connecticut and New York, and authorized under the laws of said States, to construct and maintain railways between several points in said States, as set forth in paragraph four of the bill, on March 19, 1866, by an indenture of that date, a copy whereof is annexed to and made part of the bill, conveyed in mortgage to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, all its railways, rights, privileges, franchises and property, including such property as it should thereafter acquire for the construction and operation of the railways which it was so authorized to construct and maintain; and this mortgage was ratified by the legislative acts of said several States.

The purpose of the mortgage, as set forth therein, and as alleged in the bill, was to secure certain bonds, to the amount of $20,000,000.00, to be sold and disposed of by the corporation, in order to raise the money required to provide for and retire all the then existing mortgage debts and prior liens upon the road, and to complete and equip the road, and to lay down a third rail thereon; and it was provided by the mortgage indenture that the bonds, when issued and certified by the trustees, should be a lien upon the property conveyed by the mortgage, and upon the property thereafter purchased or acquired, passing under the mortgage.

At the date of the mortgage, the railroad was not completed, and was, therefore, of small value,—less than the proposed amount of the bonds; and the corporation had no means to complete it, but expected upon its completion that it would be of large value, and be ample security for the bonds.

October 24, 1867, the plaintiff made with the corporation a contract for the construction of one portion of its railroad; which contract is annexed to and made part of the bill. By this contract the plaintiff was to do certain work, and furnish certain materials, for the construction of said road, at certain specified rates of compensation; the work to be commenced December 1, 1867, and to be completed June 1, 1869; payments to be made monthly of 90 per cent. of the amount earned, as estimated by the engineer of the corporation, and 10 per cent. to be reserved until the termination of

the contract. This contract was approved and assented to in writing by two of the trustees under the mortgage.

At the time this contract was made, none, or only an inconsiderable part, of the bonds secured by the mortgage had been sold or disposed of.

The plaintiff performed work and furnished materials under the contract, for which he was paid only in part; and there is due him under the contract, $1,030,693.29, with interest from January 1, 1870.

A large sum of money was realized from the sale and disposal of the mortgage bonds, — more than enough to discharge the plaintiff's debt; and the same was not applied to the payment of this debt, but was expended in acquiring new property to be held under the mortgage, and in improving and increasing the value of the property held under the mortgage to an amount exceeding in value the amount due the plaintiff.

The corporation continued to hold its franchise and railroad until, by proceedings in bankruptcy, on the petition of Seth Adams, filed October 21, 1870, the defendants, Bradley, Barnard and Chapman, became assignees thereof by assignment dated March 18, 1871; and they are still such duly qualified assignees.

The defendants, Hart, Olyphant and Clark, on July 28, 1871, became and now are trustees under the mortgage as successors of the original trustees; and on August 17, 1871, as such trustees, took possession of the mortgaged premises, including the property acquired and increased in value as aforesaid after the date of the mortgage, and now hold the same for foreclosure of the mortgage.

The corporation, before the filing of the bill, became and was insolvent, and was insolvent when the plaintiff's debt became due, and had no funds or property for the satisfaction thereof, except such as was claimed and is now held under the mortgage by the said trustees.

The mortgage contained among its other provisions the following covenant by the corporation with the trustees: —

6th. "That the expenditure of all sums of money realized

by or from the sale of the bonds issued under this mortgage, shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part, before the same shall be a charge upon any of the sums received from said sales."

Allegations not admitted by the Demurrer.

The bill contains sundry further allegations, setting forth, or purporting to set forth, this provision of the mortgage, and what the plaintiff claims to be its construction, purpose and effect, the duties and powers of the corporation, and the trustees, and the rights of the plaintiff derived therefrom; and also, the purpose, object, intention and understanding of the corporation, trustees and plaintiff, in making the contract between the plaintiff and the corporation, and procuring and accepting its approval by two trustees, and the effect thereof; which allegations are in substance the following: —

In the 6th paragraph of the bill (Record, p. 3, fol. 6).

1. That said provision in the mortgage was among other things "in order to induce other persons to enter into contracts for the construction and completion of said railroad."

2. That said provision was "a part of the terms and trusts under which the trustees held and were to hold the trust estate, and according to which they bound themselves and their successors to act."

3. That it was agreed by the mortgage indenture "that such contracts, so assented to, should and would be a charge upon such sums so received and realized by or from such sales."

In the 7th paragraph of the bill (Record, p. 4, fol. 7).

4. That the approval and assent of two of the trustees, written on the contract, was the approval and assent of the trustees.

In the 8th paragraph of the bill (Record, p. 4, fol. 7–8).

5. That "the purpose, object, intention and understand-

ing of the parties, to wit, the said corporation, the trustees, and the complainant, in procuring such approval, in making the same and in accepting the contract so approved, was that the sums to become due to the complainant under that contract should be a charge upon the sums to be received from said sales of said bonds."

6. That the plaintiff undertook and performed his work, "relying for his compensation on the sums of money to be derived from said sales of bonds, and his lien thereon by virtue of the premises," and that the corporation and trustees knew of such reliance.

In the 10th paragraph of the bill (Record, pp. 4, 5, fols. 8, 9).

7. That the amounts due to the plaintiff became and were a charge and lien upon the money derived from the sale of the bonds.

8. That the money raised by sale of the bonds became appropriated to, and ought to have been used and paid to discharge the debt to the plaintiff and to no other purpose.

9. That it was within the power of the trustees to cause the same to be devoted to that purpose and to prevent the same from being devoted to any other purpose.

10. That "by virtue of the premises, the said trustees and the said corporation became bound to the complainant so to do, and became trustees for his benefit for that purpose, under said indenture and agreement."

11. That said trustees and corporation wrongfully permitted and suffered the money which ought to have been paid to the plaintiff to be otherwise expended, to an amount exceeding the amount due to the plaintiff.

In the 3d paragraph of the bill (Record, p. 2, fols. 4, 5).

12. That at the present time, and on March 18, 1871, and on October 21, 1870, and long prior thereto, the plaintiff "had a valid and subsisting lien on the said property and franchises of said corporation, arising from and created" by the facts and proceedings set forth.

Upon these allegations above specified, twelve in number, ingeniously interwoven with the facts set forth in the bill,

the plaintiff relies to establish his claim, that under the indenture of mortgage his contract became a charge upon the money proceeds of the sale of bonds in the hands of the corporation; that the corporation and trustees became trustees for his benefit of said proceeds and bound to apply them to his debt; that by the failure of the corporation to apply said proceeds in payment of his debt, and the failure of the trustees to compel such application, and upon the expenditure otherwise of said proceeds, his charge upon the proceeds followed, and attached to, and became a lien upon, the mortgaged property in the hands of the trustees, upon which the proceeds were expended; and that this lien is entitled to preference over that of the bondholders for whose security the mortgage was originally given. The enforcement of this preferred lien is the relief sought by this bill.

I.

Effect of the Demurrer.

The demurrer does not admit the several allegations in the plaintiff's bill above specified and enumerated.

(1.) The allegations numbered 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, are clearly averments of matters of legal inference and of the construction of written instruments. They are conclusions of law which are not admitted by demurrer.

It is equally clear that the allegations numbered 5 and 6, severally, contain either the averment of a conclusion of law, to wit, the construction and legal effect of written instruments, or the averment of a parol agreement, which it would be incompetent to prove. In neither case is the demurrer an admission.

Ford *v.* Peering, 1 Ves. Jr. (Sumner's ed.), 72, 78 and note *a*.
Lea *v.* Robeson, 12 Gray, 280.
Redmond *v.* Dickerson, 1 Stockt. 507.
Green *v.* Dodge, 6 Hammond, 80.

In Lea *v.* Robeson the head-note is, "In a bill in equity to enforce rights depending on the construction of a written

contract set forth in the bill, the construction alleged, if not the true one, is not admitted on demurrer."

We further cite the opinion of Shaw, C. J., in this case, as directly in point: "All the facts well pleaded in a bill are admitted by demurrer. But if a party sets forth an agreement in writing, and all the circumstances to give it its proper and legal effect, and then avers that he did not assign by that agreement certain things which might or might not be within it, it is the averment of a conclusion of law from the agreement, *or* it alleges another and parol agreement, inconsistent and incompatible with the written agreement, which it would not be competent to control by parol evidence; and in either case the defendant may safely demur.

"If it is a question of construction of the agreement, that is open on the demurrer, and the plaintiff has the full benefit of it. If the plaintiff actually intended to offer a parol agreement of what was intended to be granted by the assignment, that is, of the negotiation, — if it was not repugnant to the written agreement, not a different contract, in different terms, it would be useless and unnecessary; if it was, it would be inadmissible."

See also Bailey *v.* Railroad Co., 17 Wall. 96.

(2.) Mere averments of purpose, object, intent, and understanding, reliance on the part of the complainant and knowledge on the part of the defendants, like general allegations of fraud or of trust, are not admitted by demurrer unless the facts and circumstances specifically set forth, are such as to sustain the allegation.

They are mere color put upon the circumstances by the pleader.

Nesbitt *v.* Berridge, 8 L. T. (N. S.) 76.
Grenville-Murray *v.* Clarendon, L. R. 9 Eq. 11.
Hayman *v.* Governors of Rugby School, L. R. 18 Eq. 28, 44, 45, 86.
1 Daniel, Ch. Pract. (4th Am. ed.) 544, 546.

Story Eq. Pl., § 37*a*, § 254*b*, § 249*a*.
Morris *v.* Morgan, 10 Sim. 341.
Ellis *v.* Colman, 25 Beav. 662.
Evans *v.* Avon, 6 Jurist N. S., 1361.

In Nesbitt *v.* Berridge, the Master of the Rolls says: —

"Such charges (of general fraud) make not the slightest impression upon the mind of the Court, upon the hearing of a demurrer. I am bound, therefore, to say that the fact of a bill containing charges of fraud is no reason why a demurrer to it cannot be put in."

(3.) If the plaintiff's allegations numbered 5 and 6, be construed as averments that the parties in procuring, making and accepting their written contract, and the assent to it, and in acting under it, intended and understood that such contract should and would have a different legal effect from that which it really has, this is merely an averment of a mistake of law, and not of a mistake of fact; and against such mistake equity will grant no relief, especially as against the rights of creditors, whether they are the general creditors of the corporation, or the creditors under the mortgage.

Hunt *v.* Rousmaniere, 1 Pet. 1.

1 Story, Eq. Jur. §§ 111, 113–116, 121–125, 137–164 *d*.

Even averments of mistake of fact in making a contract are material, and admitted by demurrer only when there is a prayer to reform the contract, and the proposed alteration is distinctly set forth. There is no such prayer here.

Re Malet, 30 Beav. 407.

4. The allegations referred to, numbered 5 and 6, are at least ambiguous and uncertain in their construction.

We claim that they are to be construed as averments of conclusions of law; if the plaintiff meant to allege a separate and distinct contract he should have said so; if he meant to allege that he was mistaken as to the legal effect of his contract, he should have said so.

When the meaning of an averment in a bill is doubtful, the Court adopts on demurrer the construction most favorable to the defendant.

"Uncertainty is a defect in pleading, of which advantage may be taken by demurrer."

Foss *v.* Harbottle, 2 Hare, 461, 502, 503.

"If the allegations are inconsistent or uncertain, or if any material allegation be omitted, the construction on demurrer will be against the bill."

Adams, Eq. 335.
Ayckbourn, Eq. Pract. (ed. 1870,) 113.

II.

NO CHARGE WAS CREATED IN FAVOR OF THE PLAINTIFF ON THE MONEY PROCEEDS OF THE SALE OF THE MORTGAGE BONDS.

The plaintiff relies upon a clause in the mortgage and upon the assent of two of the trustees to the plaintiff's contract as establishing a charge on these proceeds.

The plaintiff asserts that a lien or charge was created upon money which had no earmark, and which, by the tenor of the mortgage, was to be received by the corporation from day to day, according as it sold the bonds; and which was to be expended by it from day to day, not on one contract or on one part of the undertaking, but under various contracts upon the whole of its undertaking. To establish such a construction of the mortgage as would support this conclusion requires the clearest and strongest proof of intent, either by express declaration or by unavoidable implication.

The bill sets forth in distinct terms that it was agreed by the indenture "that such contracts, so assented to, should and would be a charge upon such sums so received and realized by or from such sales."

But by reference to the clause relied on (see mortgage, Record, p. 13, fol. 22) it will be seen that no such express provision is made, and that the allegation rests upon the implication sought to be derived from the following provision: —

"That the expenditure of all sums of money realized by or from the sale of the bonds issued under this mortgage shall be made with the approval of at least one of the said trustees, whose assent in writing shall be necessary to all contracts made by the party of the first part before the same shall be a charge upon any of the sums received from said sales."

We submit that the two propositions are widely different, and that no such effect as is contended for by the plaintiff is to be derived by implication from the language used.

(1.) The word "*charge*" is not used in the strict and technical sense. This appears from the whole scope of the mortgage indenture.

The clause is in form one of a series of covenants on the part of the corporation; and is in fact an agreement that it will expend its funds with the written approval of one of the three trustees.

There is nowhere, in these covenants or in any part of the indenture, manifested any intent to secure contractors or parties dealing with the corporation. Its purpose is declared in express terms to be "*for the better securing and more sure payment of the sums of money mentioned in said mortgage bonds, and each of them according to the tenor thereof.*" (See mortgage, Record, p. 10, fol. 18.)

The clause in question is manifestly designed, in furtherance of this main purpose of the mortgage, to provide an additional safeguard to secure the application of the funds advanced by the bondholders to the improvement of the property by which they were secured, by providing a stipulation, on the part of the corporation, to that effect.

(2.) The complainant is not a party to the indenture, and is not entitled to claim any benefit under its provisions.

Low *v.* Bagwell, 4 Dr. & War. 398.
Ravenshaw *v.* Hollier, 7 Sim. 3.
Gibbs *v.* Glamis, 11 Sim. 584.
Colyear *v.* Mulgrave, 2 Keen, 81.

Even if he had a right to come in under its provisions, he has done no act prior to the filing of the bill to assert and perfect that right. Such action on his part is necessary to entitle him to claim under the indenture.

Where a party creates a trust for the payment of debts, the creditors, not being parties thereto, do not thereby become *cestuis que trust*, or invested with any power to call upon the Court to execute the trust.

Burrill on Assignments (2d ed.), 578.
Ellison *v.* Ellison, 1, Lead. Cas. Eq. 199, 212, 213, and cases cited.

(3.) But assuming the plaintiff's construction of the word "charge" to be correct, and also assuming that under some circumstances the plaintiff might claim under the indenture of mortgage, yet the construction which the plaintiff attempts to derive by implication from the clause in question, is forced and erroneous. Giving to the language of the clause its plain and ordinary signification, it does not dispense with any of the ordinary conditions for the creation of a lien or charge on moneys in the hands of the corporation; but on the contrary, prescribes one additional and extraordinary condition and prerequisite, viz. the consent of one of the trustees to the contract, in favor of which a charge is to be created.

The first and essential condition for binding funds by a charge, is, that the parties to the contract should agree to that effect; and a second and almost equally essential condition, where, as in this case, the debtor is to retain the funds in his own custody, is to provide some means and instrumentality for enforcing the creditor's rights over them.

But here the contracting parties, the plaintiff and the corporation, with their written contract before the Court, have entered into no stipulation for a charge, and have set forth no method for enforcing one.

The Court is called on to create and enforce a charge which,

court below as cases of equitable lien were those in which the appropriation was of money in the hands of a third person, or of property or securities sent to a third person to be applied to payment of a particular debt; or cases of ordinary assignments for benefit of creditors, or cases, following *ex parte Waring*, as to the application in bankruptcy of securities held by the acceptor of a bill of exchange, which incidentally inure to the benefit of the holder of the bill.

See Vaughan *v.* Halliday, *ubi sup.*

III.

THE MORTGAGE HAS PRIORITY OF ALL LIENS.

Even though the contract of the corporation with the plaintiff, assented to by two of the trustees, created a charge upon the money proceeds of the sale of the bonds, and though the corporation failed to pay the plaintiff's debt so charged upon its funds, and expended said funds upon the property embraced under the mortgage, the plaintiff is not entitled to follow the funds, and to establish or enforce his lien upon the mortgaged property, in priority to the claims of the bondholders which the mortgage was designed to secure.

(1.) To allow such effect to the plaintiff's charge upon the funds would be manifestly against an equity prior in time, and, therefore, prior in right, to the plaintiff's claims.

The plaintiff takes his rights, whatever they are, under his contract, with full notice of the mortgage, and of the rights of the bondholders, who are the *cestuis que trust* under it.

The assent of two of the trustees on which he relies as the foundation for his "charge," affects him with notice of the mortgage and of its contents; among which is the express declaration, that the "*mortgage is to be the first and only lien on the property and franchises of the company.*"

See Mortgage (Record, p. 9, fol. 16).

Mason *v.* Cumberland Railroad Company, 52 Maine, 82.

And he takes his rights under a corporation which, with his knowlege, has expressly stipulated "that they will, at their own proper charge, do all things necessary to be done to keep intact the lien hereby created."

(See Mortgage Record, p. 12, fol. 20).

That the bondholders in great part became *cestuis que trust* by purchase of their bonds after the date of the plaintiff's contract, does not affect the priority of their right; for the nature and extent of their equitable estate are determined by the mortgage, and relate back to its inception.

"It would be more than constructive notice; it is a presumptive evidence of a strong character of actual knowledge to him that *bona fide* holders had advanced or would advance (it is immaterial which) upon the faith of this mortgage and upon the faith of the public record as to the title and incumbrances."

Fisk *v.* Potter, 2 Abb. Appeals, Dec. 138, 142.

Nor is their right affected by the fact that a large part of the property now held under the mortgage was acquired or increased in value subsequent to the date of the mortgage; since this was its contemplated effect, and the security upon which their advances were predicated.

Dunham *v.* Railway Company, 1 Wall 254.
Galveston Railroad *v.* Cowdrey, 11 Wall. 459.
Willink *v.* Morris Canal Co., 3 Green Ch. 377, 402.
Pennock *v.* Coe, 23 How. 117.

In Galveston Railroad *v.* Cowdrey, p. 481, it is said," Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly

attached to and covered by the deed, and would have fed the estoppel created thereby."

The plaintiff had not a direct lien upon the road and property mortgaged for the benefit of bondholders as against such prior mortgage by virtue of his funds having been applied to the improvement of their security.

Galveston Railroad *v.* Cowdrey, 11 Wall. 459.

Nor was it competent for the corporation, the contractor and the trustees, all assenting and co-operating, to create directly such a lien to the prejudice of the rights of bondholders.

Dunham *v.* Railway Co., 1 Wall. 254.

It will be admitted that no such lien, to take effect prior to the mortgage, could be created by the corporation and contractor. The assent of one of the trustees can make no difference. There is nothing in the mortgage indenture to countenance the idea that the bondholders were to be thus at the mercy of the trustees. But the plaintiff's contention would put them at the mercy of any *one* of the trustees who might undertake to create such a lien without the knowledge or even against the will of the others.

The only duty imposed upon the trustees, prior to foreclosure (except as to the bonds to be retained in their hands for a specific purpose), was to see that the proceeds of the bonds went to increase the bondholders' security; no authority can be implied in them, still less in any one of them, to create a lien prior to that security, in the face of the provision of the indenture that the mortgage shall be the first and only lien on the property covered by it.

To allow the contractor, corporation and trustees first to establish a charge on the proceeds of the bonds, and then by breach of trust, on the part of the corporation and trustees, in misapplying these proceeds, to which breach the bondholders are no parties, to transfer the charge to the mortgaged estate, would be to allow that which could not be done directly to be done by indirection: a result which will not commend itself to a court of equity.

It would be to invalidate, by the act of the parties creating it, a security intended and expressly declared to be an absolute and first security, without the consent of the party whose money has been advanced upon the strength of that security, and in favor of one who had notice of its intended priority.

To give this effect to a breach of trust would require the Court to join in a breach of a more sacred trust, to wit, that originally imposed by the mortgage indenture.

There is no room here for the application of the doctrine laid down in United States *v.* New Orleans Railroad, 12 Wall. 362, that a vendor's lien has priority over a mortgage, on the ground that the property is acquired by the mortgagor *sub modo*. The plaintiff here seeks to establish no lien on what he has himself furnished to the railroad. He goes expressly for the enforcement of a lien on property purchased from others.

(2.) The bondholders whose rights are here represented through the trustees are in the position of purchasers *bona fide*, for value, without notice, of the entire property covered by the mortgage.

The bondholders, the real parties in interest, are wholly ignored by the plaintiff's bill, and it seems to be assumed that their rights and liabilities are identical with those of the trustees. Nothing can be farther from the truth.

Each purchaser of a bond became by his purchase entitled to an equitable estate in the property covered by the mortgage, and all which should thereafter be acquired and pass under it. And the price which he paid was with reference to the value of the completed undertaking.

The bonds being negotiable, *bona fide* purchasers of them hold in equity the same right against the mortgaged property on which they are secured, as they hold in law upon the bonds themselves; they are not affected by any equities of which they have not notice.

Carpenter *v.* Longan, 16 Wall. 271.
Kenicott *v.* Supervisors, Ib. 452.

The bill and mortgage show that the bondholders are purchasers for value, and that they became such in great part after the date of the plaintiff's contract, under which he claims his lien. The fact that there is no allegation of notice to them of the claim is fatal to it.

The indenture provides no means by which the bondholders could have notice.

Notice from the form of the indenture that a lien or charge might be created on the money proceeds of the bonds in the hands of the corporation would be no notice that such charge had been created; much less could it affect them with notice of a lien or charge upon the mortgaged property, upon which, by the express terms of their recorded title, their own claim was to be the first and only lien.

Nor can it be claimed that the bondholdors are affected with notice by notice to the trustees.

(a.) The trustees themselves had no notice.

The only duty, estate, interest or power vested in the trustees jointly (except with regard to a certain number of bonds to be held in their custody for a specific purpose), was to hold the legal title until they might be called on to foreclose the mortgage; they had no control jointly over the bonds, their sale or their proceeds; and the clause relied on as giving them such control simply covenants that none of the proceeds shall be expended without the assent of one of their number, *which assent might be given without the knowledge or against the will of both the other trustees.*

The only implied duty imposed upon them was to approve no expenditure or contract which should not be for the judicious improvement and increase of the security under the mortgage.

Thus in regard to the plaintiff's contract, and other like contracts for constructing or equipping other portions of the road, it would be the duty of the single trustee to whom they might be submitted for approval, to see that the work contracted for would be beneficial to the mortgaged property, that the prices were fair and reasonable, and that it was in other respects a contract fit to be made.

But it would be no part of his duty, nor would it be within his power, to determine the amount which should become due under the plaintiff's contract or under other like contracts; or how their aggregate amounts might compare with the amount to be realized from the future and uncertain sales of bonds; or to marshall the assets and apply them ratably among the contractors; still less to pledge the mortgaged property to the payment of one or more of such contractors in priority to the claim of the bondholders which it was their sole duty to protect.

The allegation that it was the duty of the trustees to apply the proceeds of the bonds to payment of the plaintiff's claim; and the allegation that they had the power to control and secure such application, and that they made or allowed a wrongful expenditure of the fund, are alike unsupported by the terms of the indenture and the facts in the case as shown by the bill and were therefore not admitted by the demurrer.

They are therefore unaffected with notice that they were to be so applied or were not so applied.

(b.) Notice to the trustees, if shown, would not be notice to the bondholders.

The trustees were in no sense agents of the bondholders; they were appointed by the corporation; it was only after the bondholder became the purchaser of his bond from the corporation that any relation arose between him and the trustees; that relation was one of duty and of trust, not of agency.

To say that the trustees were agents of the bondholders, and therefore that notice to them is notice to the bondholders, is to allege a fiction in order to support a presumption, which has its true foundation only in fact, and all for the purpose of depriving a *bona fide* purchaser of his property.

Curtis *v.* Leavitt, 15 N. Y. 9, 194.

The indenture expressly provides that the trustees shall not be liable for the acts, omissions or default of each other; yet it is here attempted to hold the *cestuis que trust* liable for the act or default of one of the trustees.

That equity will follow a fund to which a trust attaches into whatever form of property it assumes in the hands of one affected with notice of the trust and having no higher equity than the claimant is a proposition not to be disputed, and is sustained by numerous authorities cited by plaintiff's counsel in argument in the Court below.

But in no case cited is notice inferred, or a *bona fide* purchaser for value affected with a trust, upon grounds like those here advanced.

Wiggin *vs.* Dorr, 3 Sumn. 410, is strongly in favor of the defendant, holding that the original *bona fide* holder of security for advances made has a prior and stronger equity than a surety of the debtor, who claims under a provision of the very instrument by which the security is given, but which was not made directly for the benefit of such surety.

(3.) From a somewhat different point of view, the plaintiff's claim is to hold the bondholders, who are purchasers for value, bound to see to the application of the purchase money.

The bill seeks, in substance and effect, to follow the bondholders' money into the estate purchased, on the grounnd that it has been misapplied by the corporation or trustees, or both, towards whom the plaintiff claims to stand in the relation of *cestui que trust*.

The bondholders are purchasers for value of the equitable estate which they severally have under the mortgage.

Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 477.

With regard to such purchasers, the well-established rule of equity is, that they are exempt from obligation to see to the application of the purchase money, wherever, from the nature of the case, it is impossible or manifestly unreasonable to require it. As for example: Where an immediate sale is directed, and the *cestuis que trust*, or some of them, are not in existence, or are undetermined, or not of capacity to act, so that there must be an interval of time before distribution of the purchase money; or where a sale is directed, but the proceeds are to be held by the trustees on special trusts for

investment or otherwise; or where the trust is to pay debts generally, or debts and legacies, in which cases the trust must necessarily require time, and the purchaser can neither know the creditors nor the amounts.

Perry on Trusts, §§ 793–797, and cases cited.
Gardner *v.* Gardner, 3 Mason, 178.
Elliot *v.* Merryman, 1 Lead. Cas. Eq. 45.

The rule requiring the purchaser to see to the application of the purchase money, has been abrogated by statute in England (see Sugden on Vendors 14th ed. 657), and has never been favored by the Courts of this country.

Perry on Trusts, § 798.
1 Lead. Cas. Eq. 77 note.

It would not, at any time, or in any court, have been applied to a case like that now presented, —

1st. Where the whole scope and intent of the instrument under which the trust is alleged to arise, is to provide for the security of the bondholder, who is the purchaser.

2d. Where the purchase money was by the terms of that instrument to be paid to the corporation whose breach of trust is alleged as the foundation of the plaintiff's claim.

3d. Where such payment was to be made from time to time, to wit, as the bonds could be disposed of in the market to best advantage. (See Mortgage, Record, p. 9, fol. 15.)

4th. Where the purchasers were from the nature of the case numerous; and where from the frame of the security it was evidently contemplated that they would be at least, in part, foreigners. (Mortgage, Record, p. 9, fol. 15.)

5th. Where payment necessarily preceded the expenditure.

6th. Where the expenditure was to be made from time to time, and for various purposes, and under various contracts, and over the wide-spread territory covered by the mortgage.

7th. Where, even upon the allegations of the bill, no part of the expenditure has been made beyond the limits

prescribed in the original indenture by which the trust was created, or for purposes other than those therein authorized.

8th. Where the bondholders or purchasers whose security is to be affected are nowhere charged with notice of the breach of trust from which the charge affecting their security is alleged to result.

(4.) Nor can the plaintiff establish a prior equity upon the ground that his labor and materials, or the money proceeds upon which he had a charge increased the security of the bondholders.

Dunham *v.* Railway Co., 1 Wall. 254.
Galveston Railroad *v.* Cowdrey, 11 Wall. 459.

The plaintiff's allegation, that the "money so *wrongfully* expended, and suffered and permitted to be expended, greatly exceeded the amount now due, and which ought to be paid to the complainant," must be taken to mean that the whole amount of proceeds of bonds so expended exceeded the sum to which the plaintiff is entitled.

It cannot be intended to allege that more of the plaintiff's money was so expended than is due to the plaintiff; for such an allegation would be in terms inconsistent, and without sense.

So, too, the accompanying and correlative statement, that "the value of the new property so improperly acquired by such expenditure, and the increase of value so added to the property held under said indenture greatly exceeded the amount due to the complainant," must be taken to refer to the property acquired, and increased value given by the whole expenditure of the proceeds of the bonds.

Now, the bondholders were by the terms of the indenture entitled to have the whole amount of the proceeds of their bonds expended upon the property which they held for their security; and adopting the only sensible construction of the plaintiff's allegations in this regard, and the only fair inference from the facts alleged, it does not appear that they have, in fact, had any further expenditure made upon their mortgaged property than they were so entitled to have.

There is no allegation that the bondholders have had more spent upon the road than the proceeds of the $20,000,000.00 of bonds which they were entitled to have spent upon it. If there was any such allegation, then, perhaps, it might be necessary to inquire whether the plaintiff had any equity in the surplus. But no such inquiry can now arise.

Their right to the application of the whole proceeds, was, as above shown, an equity prior both in time and in right to any which the plaintiff could acquire.

V.

THE PLAINTIFF'S LACHES.

If the plaintiff ever acquired a charge upon the money proceeds of the bonds, or a lien upon the mortgaged property, such charge and lien have become forfeited by his laches.

The plaintiff makes no averment of any attempt to enforce his alleged charge or his alleged lien. If, by his contract, assented to by two of the trustees, he had, *ipso facto*, a charge upon the moneys which the corporation might from time to time realize from the bonds, he had equal means with the trustees of knowing when and to what extent the bonds were sold, and better means than they of knowing what was his due; he should have asserted his charge, and if the trustees were bound to enforce it, he should have called on them to do so.

So, too, if the moneys were wrongfully expended, and his lien upon the property thereby accrued, he had equal means with the trustees of knowing of such expenditure, and might then have moved to enforce his lien as he now does.

By the terms of his contract his work was to commence December 1, 1867, and to be completed June 1, 1869.

During all this time, down to the date of filing his bill, — May 17, 1872, — the plaintiff has slept upon his alleged rights.

Meantime, the trustees with whom he dealt have been suc-

ceeded in the trust by the present trustees, who had no notice of his claim; and the bonds, to the amount of $20,000,000.00, have been from day to day upon the market, transferable by purchase from hand to hand to *bona fide* holders, ignorant of this lien, now at this late day asserted to diminish the value of their security.

Laches disclosed by the bill is good ground for demurrer.

Sleeman *v.* Wilson, L. R. 13 Eq. 36.

Maxwell *v.* Kennedy, 8 How. 210.

C. S. BRADLEY,
WM. G. RUSSELL,
For Defendants.